Supreme Court, U.S.
FILED

03 637 OCT 27 2003

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY S. BISHOP
RUSSELL R. EGGERT
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

DOUGLAS E. KAHLE
Counsel of Record
MARK R. BAUMGARTNER
Pender & Coward, P.C.
222 Central Park Ave.
Virginia Beach, VA 23462
(757) 490-3000

Counsel for Petitioners

QUESTION PRESENTED

The court of appeals, in square conflict with the Fifth Circuit's decision in *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), and at odds with the principles laid down by this Court in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), held that federal authority under Clean Water Act Section 404 encompasses wetlands on petitioners' property that have only an ephemeral, intermittent, occasional, and indirect manmade hydrological connection to navigable waters located miles distant. The question presented, which is of critical nationwide importance to determining the scope of burdensome federal permitting schemes and the balance of power between state and federal regulators, is:

Whether federal Clean Water Act jurisdiction over "navigable waters" extends to wetlands that are not adjacent or contiguous to open waters but from which rainwater runoff may occasionally reach navigable waters located miles away through a series of manmade, indirect, ephemeral, and intermittent surface water connections.

RULE 29.6 STATEMENT

None of the petitioners has a parent corporation or a non-wholly owned subsidiary, and no publicly held corporation owns 10% or more of any petitioners' stock.

Additional plaintiffs in the district court and appellants in the court of appeals were the Virginia State Water Control Board and Dennis H. Treacy, Director of the Virginia Department of Environmental Quality.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. The Statutory and Regulatory Scheme. 4

B. The Corps' Enforcement Action And The District Court's Findings Of Fact And Decision 5

C. The Fourth Circuit's Decision 7

REASONS FOR GRANTING THE PETITION 7

A. The Fourth and Fifth Circuits Are In Direct Conflict Concerning Whether Nonnavigable, Intermittent, Ephemeral Waters Are "Navigable Waters" Within The Meaning Of The Clean Water Act. 7

B. The Fourth Circuit's Decision Is At Odds With The Principles This Court Set Forth In *SWANCC* 10

C. The Fourth Circuit's Decision That Roadside Ditches Are Tributaries Is Inconsistent With The CWA, Because The CWA Defines A Ditch As A "Point Source" And Not A Tributary 13

D. The Fourth Circuit's Erroneous Decision Flies In The Face Of Corps Regulations and Policy 14

1. The Corps' Regulations Limit Jurisdiction To The Ordinary High Water Mark 15

TABLE OF CONTENTS – continued

Page

2. The Corps' Regulatory Guidance Distinguishes Manmade Ditches From Natural Tributaries 15

3. Prior To SWANCC The Corps Treated The Type Of Wetlands At Issue The Same As "Isolated Waters" 17

E. This Court's Guidance Is Necessary Because There Is No Consistent National Policy On CWA Jurisdiction 19

F. The CWA Does Not Authorize The Corps To Exercise General Land Use Regulation, Which Congress Expressly Reserved For State And Local Governments 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Aiello v. *Town of Brookhaven*,
136 F. Supp. 2d 81 (E.D.N.Y. 2001) 13

Bowen v. *Georgetown University Hospital*,
488 U.S. 204 (1988) 14

Grayned v. *City of Rockford*,
408 U.S. 104 (1972) 7

Headwaters, Inc. v. *Talent Irrigation Dist.*,
243 F.3d 526 (9th Cir. 2001) 13

Hoffman Homes v. *United States*,
902 F.2d 567 (7th Cir. 1990) 22

Ragsdale v. *Wolverine World Wide Inc.*,
535 U.S. 81 (2002) 14

Rice v. *Harken Exploration Co.*,
250 F.3d 264 (5th Cir. 2001) ..... passim

Solid Waste Agency of Northern Cook County v.
United States, 531 U.S. 159 (2001) ..... passim

Southern Pines Assoc. v. *United States*,
912 F.2d 713 (4th Cir. 1990) 22

United States v. *Buday*,
138 F. Supp. 2d 1282 (D. Mont. 2001) 10

United States v. *Deaton*,
332 F.3d 698 (4th Cir. 2003) 9

United States v. *Rapanos*,
339 F.3d 447 (6th Cir. 2003) 10

United States v. *Riverside Bayview Homes, Inc.*,
474 U.S. 121 (1985) 11

TABLE OF AUTHORITIES – continued

Page(s)

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1
33 U.S.C. § 1251(a) 1
33 U.S.C. § 1251(b) 1, 23, 24
33 U.S.C. § 1251(g) 1
33 U.S.C. § 1311(a) 1, 4, 13
33 U.S.C. § 1342 14
33 U.S.C. § 1344(a) ..... passim
33 U.S.C. § 1344(b) 1
33 U.S.C. § 1344(g) 1
33 U.S.C. § 1362(12) 1, 13
33 U.S.C. § 1362(14) 1, 3, 13
33 U.S.C. § 1362(7) 1, 3, 4
33 U.S.C. § 2701 7

REGULATIONS

33 C.F.R. § 320.1(b) 19
33 C.F.R. § 323.2(a)(5) (1977) 17
33 C.F.R. § 328.3(a)(1) 4
33 C.F.R. § 328.3(a)(3) 17
33 C.F.R. § 328.3(a)(5) 4
33 C.F.R. § 328.3(a)(7) 4
33 C.F.R. § 328.3(a), (b), (c), and (e) 1

TABLE OF AUTHORITIES – continued

Page(s)

33 C.F.R. § 328.4(c) 1, 4, 15
33 C.F.R. § 330.2(d) 17
33 C.F.R. § 330.5(a)(26) (1986) 17
33 C.F.R. § 331.1 19
33 C.F.R. § 331.2 19
33 C.F.R. § 331.7(a) 19
33 C.F.R. § 331.7(g) 19
40 C.F.R. § 122.26(b)(8) 14
40 C.F.R. § 230.10 23
40 Fed. Reg. 31320 (1975) 16, 17
42 Fed. Reg. 37122 (1977) 16
51 Fed. Reg. 41206 (1986) 3, 4, 15, 16
55 Fed. Reg. 47990 (1990) 14
65 Fed. Reg. 12818 (2000) 4, 15, 16
67 Fed. Reg. 2020 (2002) 8

OTHER AUTHORITIES

118 Cong. Rec. 33699 (1972) 24

EPA & Corps, *Guidance for Asserting Federal Jurisdiction Over Isolated Wetlands in Response to U.S. Supreme Court Decision in SWANCC Case* (Jan. 10, 2003) 5, 8

U.S. Army Corps of Engineers, Appeal Decision, Evangelista, Detroit District, File No. 00-010-030-0 (August 25, 2000) 21

TABLE OF AUTHORITIES – continued

Page(s)

U.S. Corps of Engineers, Appeal Decision, Daniel, New Orleans District, File No. 20-010-0562 (June 20, 2001) 20

U.S. Corps of Engineers, Appeal Decision, E. Tetz & Sons, Inc. and Concrete Properties, New York District, File No. 2000-00117 (June 24, 2003)..... 21, 22

U.S. Corps of Engineers, Appeal Decision, Meehan, New York District, File No. 2002-00023 (November 19, 2002) 21

U.S. Corps of Engineers, Appeal Decision, Memphis Stone and Gravel Company, Vicksburg District, File No. 200113910 (July 19, 2002)..... 20

U.S. Corps of Engineers, Appeal Decision, Molycorp, Inc., Los Angeles District, File No. 2000-01678 (August 16, 2001)..... 20

U.S. Corps of Engineers, Appeal Decision, NEC Transit/Williams, L.L.C., Buffalo District, File No. 2000-00325(2) (August 30, 2001)..... 21

U.S. Corps of Engineers, Appeal Decision, Soundview Properties, Inc., Jacksonville District, File No. 199905468 (November 19, 2001)..... 20

U.S. Corps of Engineers, Appeal Decision, Sunrise Office Park, Los Angeles District, File No. 2001-00379 (September 7, 2001)..... 20

V. Albrecht & B. Goode, Wetland Regulation in the Real World (Feb. 1994)..... 22, 24

PETITION FOR A WRIT OF CERTIORARI

Petitioners Newdunn Associates LLP, Orion Associates, and Northwest Contractors Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 344 F.3d 407. The opinion of the district court (App., *infra*, 20a-56aa) is reported at 195 F. Supp. 2d 751.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Clean Water Act, 33 U.S.C. §§ 1251(a), (b), (g), 1311(a), 1344(a), (b), (g), 1362(7), (12), (14) are set forth at App., *infra*, 57a-60a. The relevant regulations, 33 C.F.R. §§ 328.3(a), (b), (c), (e), and 33 C.F.R. § 328.4(c) are set forth at App., *infra*, 60a-62a.

STATEMENT

The issue in this case is whether Congress, in enacting Section 404(a) of the Clean Water Act ("CWA" or "Act"), authorized the United States Army Corps of Engineers ("Corps") to assert jurisdiction over activities on property containing wetlands adjacent to manmade ditches that are only intermittently wet and that are located miles from navigable waters. The Corps has asserted jurisdiction in this and other cases based upon its interpretation that the navigable waters of the United States encompass any wetland from which rainwater may ultimately flow into navigable waters, no matter how remote, indirect, or occasional that runoff may be. In upholding such broad federal jurisdiction

(and reversing the district court), the Fourth Circuit seriously misunderstood this Court's teachings and created a square conflict with the Fifth Circuit as to the scope of a major federal statute affecting the use of land across the Nation.

This Court recently set forth the principles governing the Corps' exercise of jurisdiction under Section 404 of the Clean Water Act. *Solid Waste Agency of Northern Cook County* v. *United States*, 531 U.S. 159 (2001) ("*SWANCC*") (Corps jurisdiction does not reach ponds, not adjacent to navigable waters, that are used by migratory birds). This Court found that "the plain text and import of § 404(a)" is that it reaches only waters and wetlands that have a "significant nexus" and are "inseparably bound up with" waters of the United States, and that applying that standard the Act does not reach "nonnavigable, isolated, intrastate waters." *Id.* at 167, 169-170. This Court also found "no persuasive evidence" that the Corps erred in 1974 when it promulgated regulations interpreting the statutory term "navigable waters" as waters that are navigable in fact, have been navigable in the past, or could be made so in the future. *Id.* at 167. And it could discern no purpose in 1977 amendments to the CWA "[b]eyond Congress' desire to regulate wetlands adjacent to 'navigable waters.'" *Id.* at 170-171.

The Fifth Circuit, in *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), applied the principles set forth in *SWANCC*. Reading *SWANCC* to authorize CWA jurisdiction over waters that are "actually navigable" or "adjacent to an open body of navigable water," the Fifth Circuit held that "a small seasonal creek" and "intermittent streams which only infrequently contain running water" are not "sufficiently linked" to navigable waters to themselves "qualify as 'navigable waters.'" *Id.* at 270-272.

In stark contrast to *SWANCC* and *Rice*, the Fourth Circuit's ruling here allows the Corps to control

development, agriculture, and other land use activity in every wetland from which any rainwater runoff may ultimately, on occasion, reach navigable waters. The Fourth Circuit treats ephemeral, intermittent waters distant from navigable waters as within CWA jurisdiction; the Fifth Circuit does not.

The Fourth Circuit also held that manmade roadside ditches and culverts were waters of the United States. App., *infra*, 17a. Yet, the Corps has long recognized a distinction between manmade ditches and natural streams, and, prior to this Court's decision in *SWANCC*, did not generally consider manmade drainage ditches to be waters of the United States. See 51 Fed. Reg. 41206, 41217 (1986). Nonetheless, the Fourth Circuit considered the distinction "irrelevant," App., *infra*, 17a, deferring to the Corps' new position.

The Fourth Circuit's decision in this regard directly conflicts with the plain language of the CWA, which defines ditches, culverts and other manmade conveyances as "point sources," 33 U.S.C. § 1362(14), App., *infra*, 60a, not as "waters of the United States." 33 U.S.C. § 1362(7), App., *infra*, 59a. And the Corps only sometimes, on a case-by-case basis, considers ditches and culverts to be jurisdictional "tributaries" of navigable waters. Neither the Fourth Circuit nor the Corps provide any guidance to landowners as to when federal jurisdiction will be asserted over such ditches.

Under the Fourth Circuit's decision, the CWA reaches to the top of every mountain and the end of every street in the country. The Corps is permitted to exercise this broad jurisdiction without any showing of actual effect on navigable waters or interstate commerce. Given the split among circuits, the contrast between the virtually limitless jurisdiction accorded the Corps by the Fourth Circuit and the direction given by this Court in *SWANCC*, and the practical importance of the question presented to landowners and regulators throughout the country, this Court should grant certiorari.

A. The Statutory and Regulatory Scheme.

When Congress enacted the CWA, it delegated authority to the Corps to issue permits for the discharge of dredged and fill material into "the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a); 33 U.S.C. § 1311(a); App., *infra*, 58a. The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7), App., *infra*, 59a. The statute does not define "waters of the United States."

The Corps asserted jurisdiction in this case pursuant to regulations that define "waters of the United States" to include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" (33 C.F.R. § 328.3(a)(1), App., *infra*, 60a), tributaries of such waters (33 C.F.R. § 328.3(a)(5), App., *infra*, 61a), and wetlands adjacent to such waters or their tributaries. 33 C.F.R. § 328.3(a)(7), App., *infra*, 61a.

The Corps' regulations do not define the term "tributary," and do not define manmade drainage or irrigation ditches as navigable waters of the United States. In some regulatory interpretations, the Corps explains that a manmade ditch is subject to the Corps' jurisdiction only if it extends the ordinary high-water mark of an existing water of the United States. 65 Fed. Reg. 12818, 12824-25, App., *infra*, 38a n.13.[1]

---

[1] The Corps' regulations specify that CWA jurisdiction in nontidal waters extends only to the ordinary high-water mark, or if adjacent wetlands are present, to the extent of those wetlands. 33 C.F.R. § 328.4(c)(1), (2), App., *infra*, 62a. In the preamble to its 1986 Regulations, the Corps states "[t]herefore, it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible." 51 Fed. Reg. at 41217 (1986), App., *infra*, 38a.

However, the Corps reserves, on a case-by-case basis, the right to assert jurisdiction over ditches that can flow, even intermittently, into other covered waters, but articulates no meaningful guidance on the appropriate basis for such a decision. App., *infra*, 47a; see EPA & Corps, *Guidance for Asserting Federal Jurisdiction Over Isolated Wetlands in Response to U.S. Supreme Court Decision in SWANCC Case* (Jan. 10, 2003) ("*Corps 2003 Guidance*").

B. The Corps' Enforcement Action And The District Court's Findings Of Fact And Decision

During the summer of 2001, Newdunn Associates L.L.P. ("Newdunn"), and its agents, Orion Associates ("Orion") and Northwest Contractors Corporation ("Northwest"), began logging, filling and excavating on Newdunn's property in Newport News, Virginia. The Corps and the Virginia State Water Control Board ("Board"), acting through the director of the Virginia Department of Environmental Quality ("DEQ"), Dennis H. Treacy, filed enforcement actions in federal and state court, respectively. Both agencies accused Newdunn of conducting unauthorized activities in wetlands.[2]

---

[2] Virginia state law, at the time of Newdunn's activities, specifically permitted placement of fill into wetlands. App., *infra*, 23a. Therefore, Newdunn's filling activities did not violate state law. Once a wetland is filled, it is no longer saturated to the surface with water and therefore no longer a wetland. The State alleged that because the placement of fill eliminating the wetlands was unauthorized by the Corps, Newdunn's activities in the converted uplands violated other state laws. Because the State's allegations hinged upon whether the fill was authorized, Newdunn removed the State's suit to the federal court, which consolidated the enforcement actions for trial. The Fourth Circuit held that the district court did not have jurisdiction to decide the asserted violation of state law. App., *infra*, at 13a. Petitioners do not seek review of that part of the Fourth Circuit's decision.

The district court conducted a five-day bench trial, after which it ruled that neither the Corps nor the Board had jurisdiction over Newdunn's property. The court found that the wetlands on Newdunn's Property "are not adjacent to navigable waters or waters of the United States by any reasonable definition of adjacency." *Id.* at 54a.

At trial, the "Corps' claim of jurisdiction [was] based solely upon the alleged surface water or hydrologic connection of the Property to the navigable portion of Stony Run." App., *infra*, at 29a-30a. The district court carefully traced how tenuous a hydrologic connection that was. "Rain generated runoff" only "*occasionally* exits the property through a spur ditch"—"[t]here is no evidence," the court found, "of the frequency or volume of th[at] surface water runoff." The spur ditch leads to a manmade drainage ditch that runs east of and parallel to Interstate 64 (the "eastern I-64 ditch"). That eastern ditch, the court found, "is *ephemeral*, or dry most of the year," and any water in it is "*intermitten[t]*." Any water that continues through the eastern I-64 ditch eventually reaches a culvert under I-64, through which it travels to another manmade ditch parallel to and on the western side of I-64. That western ditch, 1¼ miles in length, "was *constructed partially through dry land*." Water "*intermittently* travels" through the western ditch into the "not-navigable-in-fact" Western Arm of Stony Run, at a point a mile away from where the Central Arm of Stony Run becomes navigable. *Id.* at 30a-32a & n.10 (all emphases added).

The district court held that in these circumstances the Corps had "not carried its burden of factually proving a sufficient connection between the wetlands on the Property and navigable waters or waters of the United States." App., *infra*, 45a. And any claim that wetlands on Newdunn's property were within the Corps' jurisdiction "far exceeded the grant of authority by congress in the CWA." *Id.* at 46a.

The court rejected the Corps' assertion that "a culvert or storm drainage pipe" is a "tributary." *Id.* at 45a.

The district court observed that although the Corps' 1986 regulations generally exclude non-tidal drainage ditches from its definition of tributaries, the Corps reserves the power to assert jurisdiction over such ditches on a case-by-case basis. *Id.* at 47a. Because the Corps failed to articulate any limits to its discretionary jurisdiction, the district court held, the regulations are insufficient to meet the constitutional guidelines set forth by this Court in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). *Ibid.*

C. The Fourth Circuit's Decision

The Fourth Circuit, although finding no error in the district court's findings of fact, reversed. It held that the attenuated connection between wetlands on Newdunn's property and navigable portions of Stony Run was a "sufficient nexus" for Corps jurisdiction. App., *infra*, at 19a. The Corps may permissibly assert jurisdiction over wetlands adjacent to nonnavigable tributaries of navigable waters, and may permissibly label as tributaries intermittent and ephemeral waters in manmade ditches and culverts and drains located miles from navigable waters. *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

A. The Fourth and Fifth Circuits Are In Direct Conflict Concerning Whether Nonnavigable, Intermittent, Ephemeral Waters Are "Navigable Waters" Within The Meaning Of The Clean Water Act.

The Fifth Circuit in *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), interpreting the Oil Pollution Act, 33 U.S.C. § 2701 ("OPA"), was the first court of appeals to reconsider the jurisdictional scope of the term "navigable waters" after the *SWANCC* decision. *Id.* at 266. The court noted that the OPA and CWA contained the same definition

of navigable waters, which should be interpreted the same way. *Id.* at 267. The court reviewed its previously broad interpretation of the language of the CWA and contrasted it with this Court's holding in *SWANCC*. *Id.* at 268-269.

Noting this Court's warning in *SWANCC* that the word "navigable" cannot be read out of the statute, the Fifth Circuit held that "a body of water is subjected to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." *Id.* at 269. Based on that standard, the Fifth Circuit held that federal authority does not extend to waters or wetlands "that have only an indirect, remote and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272. See *id.* at 270-272 (holding that "a small seasonal creek" and "intermittent streams that only infrequently contain running water" are not "sufficiently linked" to navigable waters to "qualify as 'navigable waters'" subject to federal jurisdiction); see also *Corps 2003 Guidance* (observing that "[s]ome courts have interpreted the reasoning in *SWANCC* to potentially circumscribe CWA jurisdiction over tributaries" and that *Rice* "is the leading case taking the narrowest view of CWA jurisdiction after *SWANCC*").

The district court found that the ditch nearest Newdunn's property was ephemeral. App., *infra*, 30a. The Fourth Circuit did not overturn that conclusion. The Corps' only definition of "open water" specifically "does *not* include ephemeral waters." 67 Fed. Reg. 2020, 2094 (2002) (emphasis added). Therefore, Newdunn's wetlands are not adjacent to open water.

This case thus presents the opportunity to decide the important issue specifically reserved by this Court in *Riverside Bayview* as to which the circuits are now squarely in conflict: "the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." 474 U.S. at 131 n.8. Wetlands that are not

adjacent to actually navigable waters do not have the "significant nexus" that informed this Court's "reading of the CWA in *Riverside Bayview Homes.*" *SWANCC*, 531 U.S. at 167.

As the district court found and the Fourth Circuit did not contradict, the wetlands on Newdunn's property have only an occasional, manmade, indirect, remote and attenuated connection with a body of navigable water—the Central Arm of Stony Run. If Newdunn's property were located in the Fifth Circuit the district court's opinion would have been affirmed. Instead, the Fourth Circuit adopted a starkly contrasting view of federal authority.

Rather than restricting the Corps' jurisdiction to waters with a "significant nexus" to navigable waters or those that are "inseparably bound up with the 'waters' of the United States" (*SWANCC*, 531 U.S. at 167), the Fourth Circuit holds an indirect, manmade, and occasional "nexus" sufficient. App., *infra*, at 19a.

The Fourth Circuit extends the Corps' jurisdiction to "any branch of a tributary system that eventually flows into a navigable body of water." App., *infra*, at 16a. The Fourth Circuit requires no minimum volume or frequency of water flow to support jurisdiction, and remoteness of a wetland from navigable water is no bar to the exercise of jurisdiction. Anything that "eventually provides 'additional matter'" to a navigable water is a "tributary" and therefore subject to CWA jurisdiction. *United States* v. *Deaton*, 332 F.3d 698, 710 (4th Cir. 2003).

Further expanding CWA jurisdiction, the Fourth Circuit refused to find any distinction between natural tributaries and manmade ditches and culverts. App., *infra*, at 17a. The court of appeals held that the Corps' jurisdiction includes "the entire tributary system" including roadside ditches and culverts. *Id.* at 17a. In the Fourth Circuit, any drop of water flowing from any property to traditional navigable water

through any gutter, pipe, culvert, or ditch regardless of distance or amount of flow is 'navigable water' within the meaning of the CWA. Any wetlands 'adjacent' to the gutter, pipe, culvert or ditch would be subject to federal regulation.

The Sixth Circuit has similarly expanded CWA jurisdiction in *United States* v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003). There, the court upheld CWA jurisdiction wherever a "hydrologic connection" is proven between wetlands and navigable waters. It held such a connection to be present when a wetland connected through manmade drains and creeks to navigable waters 11 to 20 miles distant. See also *United States* v. *Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001) (upholding federal jurisdiction over wetlands adjacent to non-navigable "tributaries" 235 miles from the navigable water to which they connected).

B. The Fourth Circuit's Decision Is At Odds With The Principles This Court Set Forth In *SWANCC*

Recently, this Court in *SWANCC* considered whether Clean Water Act jurisdiction extends to isolated intrastate ponds that may provide habitat for migratory birds. This Court concluded that the text of the Act does not allow the Corps to exercise such broad jurisdiction. In denying the Corps' jurisdiction over isolated ponds this Court set forth principles to guide lower courts in determining the proper scope of Section 404 jurisdiction.

Prior to *SWANCC*, some courts had interpreted the Clean Water Act as granting jurisdiction to the full extent of the Commerce Clause. This Court rejected that approach. Instead, this Court held that the Corps' jurisdiction under the Act was based on Congress' power to regulate navigation. 531 U.S. at 168 n.3 (finding nothing to "signif[y] that Congress intended to exert anything more than its commerce power over navigation").

This Court rejected the Corps' position that the word "navigable" in the statute has no "independent significance." 531 U.S. at 172. This Court instead endorsed the Corps' view of the scope of the 1972 Act set forth in the Corps' 1974 regulations—as reaching waters navigable in facts, navigable in the past, or capable of being made navigable in the future. *Id.* at 168. Thus, "'it is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor.'" *Ibid.* quoting 33 C.F.R. § 209.260(e)(1)(1974). Statutory amendments in 1977 supported extending the meaning of navigable waters to include waters and "wetlands adjacent to 'navigable waters'" (*id.* at 170-171), leading this Court in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), to hold that Section 404(a) jurisdiction extended to "wetlands that actually abutted on a navigable waterway." *SWANCC*, 531 U.S. at 167.

This Court held in *SWANCC* that "the plain text and import of [CWA] § 404(a)" is that the Act reaches only waters and wetlands that have a "significant nexus" to and are "'inseparably bound up with'" navigable waters. 531 U.S. at 167. Wetlands that "actually abutted on a navigable waterway" and primary tributaries of navigable rivers satisfy that standard (*ibid.*); but "nonnavigable, isolated, intrastate waters" do not. *Id.* at 170.

In refusing to interpret the CWA to give the Corps jurisdiction over every pond in the country that might provide habitat for migratory birds, this Court relied on the principle that it takes a "clear statement" from Congress to "alte[r] the federal-state framework by permitting federal encroachment upon a traditional state power," such as "the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 173-174. Avoiding such encroachment through administrative overreaching is especially important in the case of the Clean Water Act, this Court observed, where Congress chose expressly to

'recognize, preserve, and protect the primary responsibilities and rights of States'" in those areas. *Id.* at 174.

The issue as to which, we have demonstrated, the courts of appeals are divided is where, within the jurisdictional scheme described in *SWANCC,* to fit wetlands that are not adjacent to traditional navigable waters but are adjacent to intermittent, ephemeral waters that occasionally run in manmade ditches and culverts through which they may eventually reach remote navigable waters. Like the Fifth Circuit in *Rice* v. *Harken*, we believe that a fair reading of *SWANCC* is that the CWA requires a more direct and substantial connection between jurisdictional and traditional navigable waters than the attenuated connection provided by the possibility of intermittent flow of some quantity of water through manmade ditches to remote navigable water. Remote, intermittent water in manmade roadside ditches is not in any meaningful sense, adjacent to, or a tributary of navigable water. As Justice Stevens understood in dissent in *SWANCC*, the effect of this Court's ruling is that "such 'isolated' waters as 'intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters'" are "completely excise[d] * * * from the scope of the Act." 531 U.S. at 189 & 190 n.14; see also *id.* at 187 n.13 (recognizing that wetlands, being only marginally "waters" are "the most marginal category of 'waters of the United States' potentially covered by the [CWA]").

Were the Corps correct in its assertion of power over water with any hydrological connection to navigable waters, no matter how remote and attenuated, the vast accretion of federal authority at the expense of traditional state powers that the Court fended off in *SWANCC* will have occurred anyway, and in a likely more potent form that leaves virtually no water anywhere in the nation beyond the Corps' reach. The same "clear statement" rule of statutory interpretation applied in *SWANCC* applies here. There is no more a clear congressional statement in the CWA that federal power

reaches wetlands adjacent to normally dry ditches that could on occasion indirectly carry runoff to remote navigable waters than there was a clear congressional statement found in *SWANCC* that federal power reaches isolated ponds used by migratory birds.

The Fourth Circuit thus failed to apply the teaching of *SWANCC*—in fact going through contortions to avoid the lessons of that case. Other courts of appeals have similarly sought to restrict the *SWANCC* decision to its facts, refusing to follow the plain statutory meaning described by this Court. *E.g.*, *United States* v. *Rapanos*, *supra*; *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001). Further guidance from this Court is now essential.

C. The Fourth Circuit's Decision That Roadside Ditches Are Tributaries Is Inconsistent With The CWA, Because The CWA Defines A Ditch As A "Point Source" And Not A Tributary

Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters. The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The Clean Water Act further defines the term "point source" as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well * * * from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

By definition, pipes, ditches and conduits are not tributaries, but rather are point sources, which can, in some circumstances, discharge pollutants into navigable waters. In *Aiello* v. *Town of Brookhaven*, 136 F. Supp. 2d 81 (E.D.N.Y. 2001), for example, the court held that "culverts * * * qualify as point sources." *Id.* at 118. Because the culverts at issue there discharged pollutants into a pond and stream that were navigable-in-fact, CWA jurisdiction existed. *Ibid.*

The Fourth Circuit's definition of "tributary" includes anything that "provides 'additional matter'" that ultimately reaches a navigable water. *Deaton*, 332 F.3d at 710. If all pipes, ditches, channels, tunnels, conduits, wells, and discrete fissures are "tributaries," then a § 402 NPDES permit would be required for all discharges into these "waters of the United States." Absurdly, every homeowner would need a § 402 permit for *any* discharges from his property into a curbside gutter or house drain. See 33 U.S.C. § 1342.

The Environmental Protection Agency, which shares CWA regulatory authority, however, defines the system of "roads with drainage systems, * * * curbs, gutters, ditches and man-made channels, or storm drains" as Municipal Separate Storm Sewer Systems. 40 C.F.R. § 122.26(b)(8). Separate storm sewers and other conveyances of urban runoff "are point sources under the CWA." 55 Fed. Reg. 47990, 47991 (1990).

The Corps' litigation position that ditches and pipes are tributaries, which is inconsistent with the plain language of the CWA, and EPA regulations, leads to absurd results not intended by Congress, and should be rejected. See *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212 (1988); *Ragsdale* v. *Wolverine World Wide Inc.*, 535 U.S. 81, 86 (2002).

D. The Fourth Circuit's Erroneous Decision Flies In The Face Of Corps Regulations and Policy

Despite the Corps' litigating position in this and other cases since *SWANCC*, the agency's regulations have long recognized narrower limits on its jurisdiction. Concepts such as headwaters, ordinary high water marks, and manmade drainage or irrigation ditches have all served to mark the outer limits of CWA jurisdiction. The Fourth Circuit's decision has vastly expanded federal jurisdiction by making all of these concepts irrelevant to the reach of the statute.

1. The Corps' Regulations Limit Jurisdiction To The Ordinary High Water Mark

The Fourth Circuit concluded that the Corps' jurisdiction reaches "'*any* branch of a tributary system that eventually flows into a navigable body of water.'" App., *infra*, 16a, quoting *Deaton*, 332 F.3d at 711 (emphasis added). Corps regulations, however, limit Corps jurisdiction in non-tidal waters to the ordinary high-water mark ("OHWM") and make clear that CWA jurisdiction ends when the OHWM is no longer discernable. 33 C.F.R. § 328.4; App. *infra*, 62a; see also, *e.g.*, 51 Fed. Reg. at 41217 (1986); App., *infra*, 38a; 65 Fed. Reg. 12818, 12823 (2000) (drainage ditch constructed in a stream is a water of the United States "provided an OHWM is still present"); Tr. of Oral Argument to Fourth Circuit at 5 (Corps' counsel acknowledged this limitation on Corps' authority).

Thus, in order for wetlands to be jurisdictional they must be adjacent to the ordinary high water mark of a non-tidal water of the United States. 33 C.F.R. § 328.4(c); App. *infra*, 62a. Here, the district court found that the eastern I-64 ditch was ephemeral, meaning that at most times during the year it was dry. App. *infra*, 30a. A ditch that does not ordinarily have water will likely not have an ordinary high water mark, and the district court made no finding that any OHWM existed in any of the ditches and culverts in issue. Nonetheless, the Fourth Circuit—without finding the presence of an OHWM—upheld the Corps' jurisdiction. In doing so, it effectively removed, as a matter of law, the jurisdictional limitation contained in 33 C.F.R. § 328.4(c).

2. The Corps' Regulatory Guidance Distinguishes Manmade Ditches From Natural Tributaries

Corps regulations have consistently treated manmade ditches differently from natural tributaries. In 1975, man-made canals which are navigable-in-fact were considered waters of the United States, but "drainage and irrigation

ditches have been excluded." 40 Fed. Reg. 31320, 31321 (1975). The 1977 regulations specifically stated that "manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States." 42 Fed. Reg. 37122, 37144 (codified at 33 C.F.R. 323.2(a)(3)) (1977). The Corps explained that drainage and irrigation ditches are only regulated by the CWA at the point where they feed into navigable waters. 42 Fed. Reg. at 37127.

Even in 1986, when the Corps began regulating drainage and irrigation ditches on a case-by-case basis, the Corps did not define ditches as tributaries. 51 Fed. Reg. 41206, 41217. Instead, the Corps recognized that non-tidal drainage ditches were even further removed from navigable waters than ponds used by migratory birds. *Ibid.*

In March 2000, the Corps stated that ditches constructed in streams could be waters of the United States if they contained an OHWM, but still did not define ditches as tributaries. 65 Fed. Reg. 12818, 12823 (2000). According to current Corps guidance, ditches constructed in uplands are still generally *not* waters of the United States. *Id.* at 12824.

Nontidal drainage and irrigation ditches that are not navigable-in-fact have *always* been excluded from the general definition of the "navigable" "waters of the United States." Given this regulatory history, it is remarkable that the Fourth Circuit ignores the district court's finding of fact that the I-64 ditches were not waters of the United States. The district court found that the Corps had failed to meet its burden to prove that these ditches were tributaries. App., *infra*, at 47a. Overturning the district court's judgment, without challenging its factual conclusions, amounts to holding that *all* manmade ditches are waters of the United States as a matter of law. There is no support for this conclusion in either the statute or the regulations.

3. *Prior To SWANCC The Corps Treated The Type Of Wetlands At Issue The Same As "Isolated Waters"*

The Corps has long recognized that there is a point in natural streams above which the flow is de minimis. This point is called the "headwaters," which the Corps defines as "the point on a stream beyond which the flow of the water body is normally less than five cubic feet per second." 40 Fed. Reg. 31320, 31321 (1975); 33 C.F.R. § 330.2(d) (2003). It is undisputed that the property in this case is above the headwaters.

In the 1975 regulations, when the Corps expanded its definition of waters of the United States, the Corps only asserted jurisdiction in tributaries "up to their headwaters." 40 Fed. Reg. at 31324 (1975). In 1977, the Corps' position was that permits would "ordinarily not be required" for activities above the headwaters. 42 Fed. Reg. at 37129. However, the Corps asserted that these headwaters were now "waters of the United States" within its jurisdiction. *Ibid.* The 1977 regulations equated waters above the headwaters with isolated waters such as the ponds in *SWANCC*. 33 C.F.R. § 323.2(a)(5) (1977); 42 Fed. Reg. 37144 n.2. As the footnote makes clear, the Corps claimed authority over isolated waters and waters above the headwaters under the broad assertion of jurisdiction in 33 C.F.R. § 328.3(a)(3) over waters "which could affect" interstate commerce–a provision upon which this Court cast substantial doubt in *SWANCC*.

The Corps issued new regulations in 1986, purportedly to "clarify the scope of the 404 program." 51 Fed. Reg. at 41217. However, those regulations now required landowners to get permits for activities above the headwaters. Still, the permit regulations treated "isolated waters" and headwaters the same. 51 Fed. Reg. at 41218: 33 C.F.R. § 330.5(a)(26) (1986).

As the history of the Corps' regulations make clear, the Corps has historically treated even natural streams above the headwaters as "isolated." Areas above the headwaters are only occasionally connected to navigable waters through surface water runoff. Ecologically, high elevation wetlands are less functional than wetlands adjacent to navigable, open water. App., *infra*, 31a. The Fourth Circuit's decision endorses the Corps' exercise of jurisdiction over waters that even the Corps recognizes as being as far removed from navigable waters as the "isolated ponds" at issue in *SWANCC*.

Although this Court has held there is "no persuasive evidence" that the Corps erred in its 1974 regulations interpreting "navigable waters" as waters that are navigable in fact, have been navigable in the past, or could be made so in the future (*SWANCC*, 531 U.S. at 167), and although 1977 amendments to the CWA did no more than indicate "Congress' desire to [in addition] regulate wetlands adjacent to [such] 'navigable waters'" (*id.* at 170-171), the Corps has time and again expanded its CWA jurisdiction to waters ever more distantly and contingently connected to traditional navigable waters. It is questionable whether many of those regulatory expansions of jurisdiction, which find no reasonable basis in the language of the CWA, survive *SWANCC*. But what is clear is that even were the current regulations permissible, they would not on any plausible interpretation reach Newdunn's wetlands, connected to distant navigable waters only by remote, ephemeral, intermittent flows of rainwater runoff through a series of manmade ditches and culverts. This 30-year history of progressive regulatory overreaching, compounded by the Corps' straining of its own regulations since *SWANCC*, warrants corrective action by this Court now.

E. This Court's Guidance Is Necessary Because There Is No Consistent National Policy On CWA Jurisdiction

Due to inconsistent administrative interpretations, and resulting confusion over the extent of the Corps' CWA jurisdiction, Section 404 enforcement actions make up approximately 75% of the Corps' reported 5,500 annual alleged violations of federal law under its regulatory authority. U.S. Corps of Engineers, Regulatory Program Overview, *available at* <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/oceover.htm>. Conversely, only 10% of the Corps' enforcement actions involve Rivers and Harbors Act violations, a statutory scheme where jurisdiction is more apparent.

Absent this Court's review of this case, landowners' property rights will continue to be determined on an arbitrary, *ad hoc* basis, with inconsistent results from different Corps divisions and courts throughout the country. Whether the Corps asserts jurisdiction over a particular piece of property depends upon where in the country the property is located. "Most of the authority for administering the regulatory program has been delegated to the thirty-six district engineers and eleven division engineers." 33 C.F.R. § 320.1(b). The Corps may determine its jurisdiction administratively as part of the Section 404 permit application process, or in a separate Jurisdictional Determination. 33 C.F.R. § 331.2. The Corps has established an administrative appeal process for jurisdictional determinations and permit decisions, (33 C.F.R. § 331.1 *et seq.*), in which each Corps division hears and decides the appeals from its subject district, (33 C.F.R. § 331.7(a)), without regard to previous decisions. 33 C.F.R. § 331.7(g). Administrative decisions have no precedential value even within the same Corps' district. *Ibid.* As a result, the scope of CWA jurisdiction varies widely.

Some Corps divisions require that a ditch, or natural watercourse, exhibit an ordinary high-water mark ("OHWM") in order to be considered "waters of the United States." For example, in the Mississippi Valley Division, a ditch was not considered a water of the United States because an "OHW mark was not evident." U.S. Corps of Engineers, Appeal Decision, Memphis Stone and Gravel Company, Vicksburg District, File No. 200113910 (July 19, 2002). In another case, the same division held that CWA jurisdiction did not extend to a property because the Corps failed to "clearly establish that the point of connection in the unnamed natural drain to the Calcasieu River was below the plain of the Calcasieu River OHWM." U.S. Corps of Engineers, Appeal Decision, Daniel, New Orleans District, File No. 20-010-0562 (June 20, 2001).

Similarly, the South Atlantic Division found CWA jurisdiction did not exist where "the district did not document the presence of an ordinary high-water mark." U.S. Corps of Engineers, Appeal Decision, Soundview Properties, Inc., Jacksonville District, File No. 199905468 (November 19, 2001).

On the other side of the country, the South Pacific Division finds CWA jurisdiction even though drainage from a property to navigable water did not exhibit an OHWM. U.S. Corps of Engineers, Appeal Decision, Sunrise Office Park, Los Angeles District, File No. 2001-00379 (September 7, 2001). And in another case, involving desert washes, (U.S. Corps of Engineers, Appeal Decision, Molycorp, Inc., Los Angeles District, File No. 2000-01678 (August 16, 2001)) the appeals officer concluded that the "policy position that a tributary connection can exist in the absence of a continuous ordinary high-water mark is reasonable." *Ibid.* Accordingly, the appeals officer upheld jurisdiction despite the fact that there was no OHWM in the desert washes. *Ibid.*

In other Corps Divisions abrupt changes make predicting CWA jurisdiction impossible. In 2000, the Great Lakes and Ohio River Division held that a drainage ditch was not a tributary, and therefore not a 'water of the United States', if it merely conveyed "runoff from climatic factors" to navigable waters. See U.S. Army Corps of Engineers, Appeal Decision, Evangelista, Detroit District, File No. 00-010-030-0 (August 25, 2000).

A year later, the same Corps Division adopted a conflicting position on CWA jurisdiction. See U.S. Corps of Engineers, Appeal Decision, NEC Transit/Williams, L.L.C., Buffalo District, File No. 2000-00325(2) (August 30, 2001). In that case, the appeals officer determined that the subject wetland had "no discernable outlet for water flow and no evidence that water ever flows from the wetland." *Ibid.* The appeals officer found only that the wetland was in "close proximity" to other wetlands, and contained "similar vegetation and soils." *Ibid.* These wetlands displayed "no discernable channel or wetland soils in the area where water overflowed." *Ibid.* In fact, water overflows occurred so "rarely or with such low velocity that it leaves no evidence of flow through erosive forces." *Ibid.* Nonetheless, CWA jurisdiction was found to exist.

A North Atlantic Division appeals officer recently upheld CWA jurisdiction where rainwater flowed down a grass upland slope and a portion of a wetland into a culvert that ran underneath a road and into an intermittent stream which was a tributary of the Hudson River. See U.S. Corps of Engineers, Appeal Decision, E. Tetz & Sons, Inc. and Concrete Properties, New York District, File No. 2000-00117 (June 24, 2003).

The landowner argued that less than a year earlier, the same appeals officer, in U.S. Corps of Engineers, Appeal Decision, Meehan, New York District, File No. 2002-00023 (November 19, 2002), had rejected the Corps' assertion of

CWA jurisdiction because the Corps had failed to prove the existence of an OHWM in a manmade drainage ditch. The appeals officer refused to explain or justify his sudden change of position and merely pointed out that the Corps' regulations "expressly prohibit citation of a prior appealed decision in any other administrative appeal." Tetz & Sons, *supra*.

The Corps' inconsistent, case-by-case approach to CWA jurisdiction is particularly troublesome because judicial review of the Corps' jurisdiction is only available after the landowner completes the application process or the Corps brings an enforcement action. *Southern Pines Assoc.* v. *United States*, 912 F.2d 713 (4th Cir. 1990) (holding that CWA provides clear and convincing evidence that Congress intended to bar pre-enforcement review); *Hoffman Homes* v. *United States*, 902 F.2d 567 (7th Cir. 1990) (same).

The application process for a Section 404 permit is costly and time consuming. The petitioner in *SWANCC*, for example, amassed an administrative record of 46,000 pages and battled with the Corps for over 13 years before this Court held that the Corps had no jurisdiction over the property. See Oral Argument Transcript at 16-17, *SWANCC*, *supra*. The average process time for those that complete the application process is 373 days. See V. Albrecht & B. Goode, Wetland Regulation in the Real World (Feb. 1994). Unfortunately, most landowners do not complete the application process. *Ibid* (reporting that the majority of individual permit applications are withdrawn). Each day countless landowners must decide whether to embark upon a lengthy and costly application process, give up their property rights, or risk an enforcement action. Under current Corps practices, it is impossible for a landowner to make a rational, informed decision.

The vastly differing and contradictory positions reflected in the administrative process demonstrate that the Corps has

no consistent national policy on CWA jurisdiction. Without clear guidance from this Court, landowners' property rights will continue to be controlled by arbitrary administrative decisions that vary from location to location and time to time.

F. The CWA Does Not Authorize The Corps To Exercise General Land Use Regulation, Which Congress Expressly Reserved For State And Local Governments

Section 404(a) grants the Corps authority to issue permits for the discharge of dredged or fill material at "*specified disposal sites.*" 33 U.S.C. § 1344(a); App., *infra* at 58a. Nothing in the plain text of Section 404 manifests Congress' intent to delegate to the Corps the authority to regulate general land use activities. To the contrary, Congress expressly set forth its policy to "recognize, preserve and protect the primary responsibilities and rights of States to * * * plan development and use [ ] of land." 33 U.S.C. § 1251(b), App., *infra*, 57a.

Pursuant to the current regulations, the Corps claims the authority to issue permits for the construction of homes, shopping centers, airports, and roads. These are not "disposal sites." They are general development activities fully and properly regulated by state and local governments.

Newdunn does not want to operate a disposal site; it wants to develop its property. However, the Corps' Section 404 permit process requires Newdunn to demonstrate to the satisfaction of the Corps that there are no practicable alternative sites that Newdunn could develop. 40 C.F.R. § 230.10. How, when, and where a landowner should be permitted to develop property is a land-use issue that Congress left to state governments. 33 U.S.C. § 1251(b), App., *infra*, 57a.

If any artificial drain or ditch would extend the Corps' jurisdiction, localities, as they seek to control rain-water

runoff, would constantly be expanding federal jurisdiction over new lands. There is no evidence that Congress intended to wrench this authority from local government and give it to the Corps. To the contrary, "[t]he conferees were uniquely aware of the process by which the dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed." 118 Cong. Rec. 33699 (1972). The legislative history shows that Congress intended for the Corps to deal with the discharge of dredged materials into navigable waters, much as it did under the Rivers and Harbors Act.

In reality, the regulatory scheme that has arisen due to the Corps' claim of Section 404 jurisdiction is unparalleled in its inconvenience and burden to the landowners. See V. Albrecht & B. Goode, Wetland Regulation in the Real World (Feb. 1994). If the Corps is allowed to extend CWA jurisdiction to every roadside ditch in the country then every local land use decision would be subject to federal review and control. This would be directly contrary to Congress' express goal to "recognize, preserve and protect the primary responsibilities and rights of States to * * * plan development and use [ ] of land." 33 U.S.C. § 1251(b), App., *infra*, 57a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

TIMOTHY S. BISHOP
RUSSELL R. EGGERT
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

DOUGLAS E. KAHLE
Counsel of Record
MARK R. BAUMGARTNER
Pender & Coward, P.C.
222 Central Park Ave.
Virginia Beach, VA 23462
(757) 490-3000

OCTOBER 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 02-1480 & 02-1594

DENNIS H. TREACY, Director,
Department of Environmental Quality;
STATE WATER CONTROL BOARD,
Plaintiffs-Appellants,
and

UNITED STATES OF AMERICA,
Plaintiff,
v.

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES;
NORTHWEST CONTRACTORS,
Defendants-Appellees.

MARY MARGARET WHIPPLE, Virginia State Senator;
L. PRESTON BRYANT, Virginia State Delegate;
CHESAPEAKE BAY FOUNDATION, INCORPORATED,
Amici Supporting Appellants.

NATIONAL ASSOCIATION OF REALTORS; THE NATIONAL ASSOCIATION OF HOME BUILDERS; NFIB LEGAL FOUNDATION; NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES; NATIONAL MULTI HOUSING COUNCIL; NATIONAL APARTMENT ASSOCIATION; REAL ESTATE ROUNDTABLE; BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION; FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS; INTERNATIONAL COUNCIL OF SHOPPING CENTERS,
Amici Supporting Appellees.

UNITED STATES OF AMERICA,
Plaintiffs-Appellants,
and

DENNIS H. TREACY, Director,
Department of Environmental Quality;
STATE WATER CONTROL BOARD,
Plaintiff,
v.

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES;
NORTHWEST CONTRACTORS,
Defendants-Appellees.

MARY MARGARET WHIPPLE, Virginia State Senator;
L. PRESTON BRYANT, Virginia State Delegate;
CHESAPEAKE BAY FOUNDATION, INCORPORATED,
Amici Supporting Appellants.

NATIONAL ASSOCIATION OF REALTORS; THE
NATIONAL ASSOCIATION OF HOME BUILDERS;
NFIB LEGAL FOUNDATION; NATIONAL
ASSOCIATION OF INDUSTRIAL AND OFFICE
PROPERTIES; NATIONAL MULTI HOUSING
COUNCIL; NATIONAL APARTMENT ASSOCIATION;
REAL ESTATE ROUNDTABLE; BUILDING INDUSTRY
LEGAL DEFENSE FOUNDATION; FOUNDATION FOR
ENVIRONMENTAL AND ECONOMIC PROGRESS;
INTERNATIONAL COUNCIL OF SHOPPING CENTERS,
Amici Supporting Appellees.

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Henry C. Morgan, Jr., District Judge.
(CA-01-508-2, CA-01-86-4, CA-01-508)

February 25, 2003, Argued
September 10, 2003, Decided

JUDGES: Before GREGORY and SHEDD, Circuit Judges, and C. Arlen BEAM, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation. Judge Gregory wrote the opinion, in which Judge Shedd and Senior Judge Beam joined.

Reversed and Remanded.

OPINION BY: Gregory

OPINION: GREGORY, Circuit Judge:

During the summer of 2001, without obtaining a permit from the Army Corps of Engineers (the "Corps") or the Virginia State Water Control Board (the "Board"), Newdunn Associates, Orion Associates, and Northwest Contractors (collectively "Newdunn") began ditching and draining wetlands on a forty-three-acre property near Newport News, Virginia (the "Newdunn Property"). Pursuant to its authority under the Clean Water Act ("CWA" or the "Act"), the Corps brought a civil enforcement action in federal district court. The Board initiated its own enforcement action in state court, premised on the Virginia Nontidal Wetlands Resources Act of 2000 (the "Virginia Act"). Newdunn removed the state action to federal court, and the two cases were consolidated. After a five-day bench trial, the district court ruled for Newdunn in both cases, finding that the Corps lacked jurisdiction over wetlands on the Newdunn Property under the Clean Water Act, and that the jurisdictional reach of Virginia law was merely coextensive with federal law. For the reasons stated below, we reverse.

I.

In 1978, Newdunn Associates purchased forty-three acres of land located in Newport News, Virginia. It is undisputed that approximately thirty-eight acres of the Newdunn Property (the "Newdunn Wetlands") were "wetlands," as that term is defined by the Corps in its CWA regulations. 33 C.F.R. § 328.3(b) (2002) (defining "wetlands" as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions"). Historically, before the construction of Interstate 64 ("I-64"), the wetlands on the Newdunn Property had a natural hydrologic connection to Stony Run, which is a navigable waterway-in-fact. Presently, the Newdunn Wetlands remain connected to the navigable waters of Stony Run by the intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches (paralleling and crossing under I-64). Silt-laden waters from the Newdunn Wetlands merge with clear water flowing south of the manmade ditch on the west side of I-64.

In May of 2001, following the Supreme Court's ruling in *Solid Waste Agency of N. Cook County ("SWANCC") v. United States,* 531 U.S. 159, 167, 121 S. Ct. 675 (2001), which struck down the Corps' attempted exercise of jurisdiction under its Migratory Bird Rule, Newdunn informed the Corps that it believed the Corps lacked jurisdiction over the Newdunn Property, and began filling the Newdunn Wetlands without a permit. Newdunn argued that there were no "jurisdictional" wetlands on the property, even though the property contained "scientific" wetlands. The Corps disagreed with Newdunn's interpretation of *SWANCC*, and on July 6, 2001, attempted to assert jurisdiction over wetlands on the Newdunn Property by commencing an

enforcement action in federal district court, alleging violations of sections 301 and 404 of the Clean Water Act.

Based on the same activities, and pursuant to Virginia state law, the Board issued an Emergency Special Order ("ESO"), mandating that Newdunn cease stumping and grading on its property. Va. Code. Ann. § 62.1-44.15(8b). Newdunn ignored the ESO, and as a result, on August 7, 2001, the Board filed a civil enforcement action in state court, alleging violations of Va. Code Ann. § § 62.1-44.5, 62.1-44.14, 62.1-44.15, 62.1-44.15:5, 62.1-44.23, and 62.1-44.32 (2001). Newdunn removed the Board's action to federal court. The Board, claiming that the district court was without jurisdiction to consider its case, filed a motion to remand. The court denied the Board's motion, and the Corps' and the Commonwealth's cases were consolidated for a five-day bench trial in March of 2002.

As to the federal suit, the district court held that the Corps' wetlands regulations were invalid because they exceeded Congress' grant of authority to the Corps under the Clean Water Act. On the state suit, the court ruled that the Commonwealth "has been unable to show that the Virginia Legislature has, at this time, granted regulatory authority independently of the Corps' jurisdiction." Accordingly, the district court determined that the Commonwealth lacked jurisdiction over the Newdunn Wetlands, since its authority was presumably coextensive with the Corps'. This consolidated appeal followed.

II.

We review *de novo* both the district court's statutory interpretation of the Clean Water Act, *Hughes River Watershed Conservancy v. Glickman,* 81 F.3d 437, 448 (4th Cir. 1996), and the district court's conclusion that it had subject matter jurisdiction over the Commonwealth's enforcement action, *In re Celotex Corp.*, 124 F.3d 619, 625 (4th Cir. 1997). We review any factual findings of the district

court for clear error. *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 284 (4th Cir. 2002).

III.

A.

Before reaching the merits of either case, we must first determine whether we have jurisdiction over the Board's enforcement action premised on Virginia law. In cases where state law creates the cause of action, federal question jurisdiction is "unavailable unless it appears that some substantial, *disputed* question of federal law is a necessary element of one of the well-pleaded state claims." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13, 103 S. Ct. 2841 (1983) (emphasis added). For a federal issue to be both a necessary and disputed element, "the vindication of a right under state law [must] *necessarily* turn[ ] on some construction of federal law." *Id.* at 9 (emphasis added).

In the present case, the district court noted that both the Virginia state statute and the Corps' federal regulations define "wetlands" as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b); Va. Code Ann. § 62.1-44.3. Based on this shared scientific definition,[1] the district court concluded "that

---

[1] It is, of course, unexceptional that Virginia would elect to take advantage of the Corps' vast technical resources in elucidating the scientific meaning of "wetlands," while at the same time making its own, unrelated decision on when and where to exercise jurisdiction over those wetlands. As Henry R. Butler and Jonathan R. Macey have observed:

> One real source of economies of scale associated with centralization of environmental regulation could be in centralized research on technical, scientific issues that recur throughout a number of different states . . . . These economies

(Continued on following page)

the state statute is coextensive with the CWA." In making this finding, however, the district court confused the definition of "scientific wetlands" and "jurisdictional wetlands."

Newdunn concedes, and the district court recognized, that at least thirty-eight acres of the Newdunn Property contained "wetlands" as that term is used in both 33 C.F.R. § 328.3(b) and Va. Code Ann. § 62.1-44.3. Thus, from a scientific perspective, there is no *disputed* federal question as to whether the Newdunn Property contains wetlands.[2] Because the resolution of this case in no way turns upon any interpretation of 33 C.F.R. § 328.3(b), there can be no federal question jurisdiction based on Virginia's decision to adopt the Corps' technical definition of wetlands. *See Franchise Tax Bd.*, 463 U.S. at 9. Stated differently, the issue is not

---

can be realized by the federal government even when most policy-making and implementation functions are handled by the states.

Henry R. Butler & Jonathan R. Macey, *Using Federalism to Improve Environmental Policy* 26 (1996).

[2] In fact, even if this case did involve a dispute over the scientific definition of wetlands, it is doubtful that the conflict would raise a question of federal law. Importantly, the General Assembly did not reference or cite to federal law in its definition of wetlands. Rather, it merely parroted the language from the federal regulation in Va. Code Ann. § 62.1-44.3. The fact that a state law might mimic the wording of a federal law, of course, does not transform interpretation of the state statute into a federal question.

Many states, for example, have "little NEPAs" on their books, which are based on language found in federal law. *See* Bradley C. Karkkainen, "Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance," 102 *Colum. L. Rev.* 903, 905 (2002) (noting that the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, "has inspired dozens of 'little NEPAs' at the state and local levels"). Notwithstanding the presence of mirrored language, courts applying those statutes are interpreting state, not federal, law.

whether the Newdunn Property contains wetlands, but whether those wetlands are within the jurisdiction of the State Water Control Board. The answer to this question is resolved solely by looking to the Virginia Wetlands Resources Act of 2000, codified at Va. Code Ann. §§ 62.1-44.3, 44.5, 44.15, 44.15:5, 44.29 (2001).

The Virginia Act was crafted after this circuit announced its decision in *United States v. Wilson,* 133 F.3d 251 (4th Cir. 1997), and after the D.C. Circuit invalidated the Corps' *Tulloch* rule, which had allowed the Corps to regulate incidental fallback as a pollutant added to a wetland, *see Nat'l Mining Assoc. v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998). Following *Wilson* and *National Mining*, and the subsequent loss of federal control over Virginia's wetlands, nearly 10,000 acres of nontidal wetlands were drained or were set to be drained in a period of less than six months. *See* Tyler Whitley, "Nontidal Wetlands Rules Bill Expected," *Richmond Times-Dispatch*, Dec. 1, 1999, at B4.[3] Although Virginia was losing wetlands at a dramatic pace, the State Water Control Board was largely without authority to act. Interpreting then-existing state law, former Attorney General Mark Earley opined, "[T]he Board [did] not have authority to regulate wetlands beyond that contemplated by the § 401 certification process" found in the CWA. 1999 Op. Va. Att'y Gen. 179.

Subsequent to this 1999 opinion, environmentalists petitioned the Virginia General Assembly to fill the regulatory vacuum. Delegate L. Preston Bryant, Jr., responded to this call, and co-patroned a bill to provide the state with a comprehensive, nontidal wetlands permitting

---

[3] As *Wilson* and *National Mining* make clear, the district court erred when it wrongly assumed that, prior to the Supreme Court's ruling in *SWANCC*, 531 U.S. 159, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001), the Corps enjoyed "seemingly unlimited jurisdiction."

program. In a letter to then-Governor James S. Gilmore, III, Delegate Bryant explained the need for his proposal as follows:

> For many years, the federal wetlands permitting program has fluctuated in its ability to protect Virginia's nontidal wetlands. This fluctuation has resulted not only from changing administrations and policies within the federal U.S. Army Corps of Engineers, but more recently from changing federal case law . . . . *A comprehensive state program would remove the uncertainty created by changing federal policies and case law decisions.*

Letter from L. Preston Bryant, Jr., Delegate, to James S. Gilmore, III, Governor (Dec. 3, 1999) (quoted in Br. of Amici Curiae Sen. Whipple, et al. at 19). Delegate Bryant's bill was ultimately passed into law, becoming the Virginia Act at issue in this case. *See* S. 648, 2000 Gen. Assem., Reg. Sess. (Va. 2000); H.D. 1170, 2000 Gen. Assem., Reg. Sess. (Va. 2000) (amending Va. Code Ann. §§ 62.1-44.3, 44.5, 44.15, 44.15:5, 44.29). Newdunn posits that the Virginia Act was crafted narrowly to close only the *Tulloch* loophole, and not to broaden the Board's jurisdiction within the Commonwealth. The plain text of the Virginia Act, however, belies this contention. Virginia law defines "state waters" broadly to include "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, *including wetlands*." Va. Code Ann. § 62.1-44.3 (emphasis added). The words "including wetlands" were added to the statute by the Virginia Act, without any jurisdictional limitation. S. 648, 2000 Gen. Assem., Reg. Sess. (Va. 2000); H.D. 1170, 2000 Gen. Assem., Reg. Sess. (Va. 2000). In "state waters," Virginia law prohibits excavating, draining, filling, dumping,

or any other activity that may significantly alter or degrade a wetland without a permit issued by the Board. *See* Va. Code Ann. § 62.1-44.5. Nothing in the Virginia Act refers to the CWA's definition of "navigable waters" or the "waters of the United States." A plain reading of the Virginia Act, therefore, makes it inconceivable that the term "wetlands" as it is used in the state legislation could necessarily turn on the resolution of a question of federal law.[4]

Alternatively, Newdunn maintains that the Board's jurisdiction depends on a resolution of federal law because

---

[4] In fact, if there were any doubt as to the meaning of the text, the legislative history of the Virginia Act makes it abundantly clear that the legislation was crafted, not to incorporate the CWA's jurisdictional limits, but rather to remedy perceived shortcomings with the jurisdictional reach of federal law.

During the 2000 General Assembly session, legislators rejected a proposal that would have limited the Board's jurisdiction to those wetlands "that are subject to federal jurisdiction under the federal Clean Water Act." *See* Legislative History of S. 695, Gen Assem. Reg. Sess. (Va. 2000), *available at* http://leg1.state.va.us/001/bil.htm; Legislative History of H.D. 1246, 2000 Gen. Assem., Reg. Sess. (Va. 2000), *available at* http://leg1.state.va.us/001/bil.htm.

Instead, lawmakers adopted an initiative that defined "wetlands" without any federal jurisdictional limitation and that was crafted not only to close the *Tulloch* loophole, but also "to protect and enhance the Commonwealth's wetland resources" by charging the Board with designing regulatory programs "to achieve no net loss of existing wetland acreage and functions." *See* Legislative History of S. 648, Gen Assem. Reg. Sess. (Va. 2000), *available at* http://leg1.state.va.us/001/bil.htm; Legislative History of H.D. 1170, 2000 Gen. Assem., Reg. Sess. (Va. 2000), *available at* http://leg1.state.va.us/001/bil.htm.

As one commenter has observed, "Under Virginia's new wetlands regulations, impacts that may have been permissible to isolated wetlands under federal regulations will be limited in Virginia. This is because Virginia includes wetlands as part of its definition of 'state waters.'" Lisa Spickler Goodwin, Annual Survey of Virginia Law: Environmental Law, 37 *U. Rich. L. Rev.* 117, 143 (2002).

Va. Code Ann. § 62.1-44.15:5 provides: "Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act." Based on this statute, Newdunn posits that the Board's jurisdiction must be coextensive with the Corps'. Newdunn's theory, however, is premised on a fundamental misunderstanding of the relationship between the federal and state permitting procedures.

Section 401(a)(1) of the CWA requires an applicant for a federal permit to "provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . ." The Commonwealth, by enacting § 62.1-44.15:5, has taken advantage of this federal provision, so that when federal and state laws overlap, applicants may use their state permits to satisfy the certification requirements under section 401 of the CWA. Of course, simply because a state permit carries the added benefit of satisfying a potentially applicable federal requirement does not mean that the state's jurisdictional reach turns on an interpretation of the CWA. Undoubtedly, situations will arise where a permittee needs a state permit, but no federal permit. In those situations, the state permitting process would apply without reference to the CWA.

As the Supreme Court of Virginia recognized, "The CWA and federal regulations allow a state program to operate a discharge elimination system program in place of the federal program, provided that the state program is authorized under state law and has standards that are *at least* as stringent as the federal ones." *State Water Control Bd. v. Smithfield Foods,* 542 S.E.2d 766, 768 (Va. 2001) (emphasis added). That is, for a state's permitting procedure to satisfy the federal requirements of 33 U.S.C. § 1342(a), the state law must be "at least" as exacting as the Clean Water Act, but of course, it may be more demanding.

Even when state and federal requirements do overlap, as was the case in *Smithfield Foods*, the issue of whether the Board has authority to regulate the subject wetlands remains a question of Virginia law. Accordingly, the Board's jurisdiction cannot "necessarily depend" on any interpretation of federal law, even if it happens that federal and state laws are coextensive on the particular facts of a certain case. *See Franchise Tax Bd.*, 463 U.S. at 13.

The Virginia Supreme Court's finding in *Smithfield Foods* that "the interests and rights of both the [federal and state] entities were vested in a single permit" does not alter this analysis. *See Smithfield Foods,* 542 S.E.2d at 770. In *Smithfield Foods*, because this court had already "affirmed the finding of the district court that Smithfield was liable," and because the United States Supreme Court denied *certiorari*, the federal determination was a final judgment for the purposes of *res judicata*. *Id.* at 768. In the present case, while the Corps and the Board may ultimately require Newdunn to obtain the same discharge permit, no final judgment in either case has been rendered.

Depending upon how the Corps and Newdunn resolve the federal case on remand, the Board's interest may or may not be satisfied. Accordingly, the Board should be permitted to pursue its rights in a Virginia court. Of course, if either the state or federal actions were to result in a final judgment requiring the issuance of a permit satisfying both federal and state laws, then Newdunn might elect to file a motion to have the unresolved action dismissed on the grounds of *res judicata*. *See Smithfield Foods,* 542 S.E.2d at 771.

In sum, in light of the Virginia Act's clear statutory language, it is apparent that "Virginia now regulates activities in wetlands beyond its federal mandate." Goodwin, Annual Survey of Virginia Law, 37 *U. Rich. L. Rev.* at 141. It would be perverse, therefore, for this court to conclude that the jurisdictional limits of the Virginia Act depend upon the

CWA. Any determination as to the extent of the Board's jurisdictional reach is purely a question of state law that does not require the resolution of any federal question. Because we lack jurisdiction over the Board's action, we reverse the district court's ruling on the Board's motion to remand, and we remand the state enforcement action to the Virginia court from which it was improperly removed.

B.

We now turn to the only case for which federal subject matter jurisdiction exists -- the Corps' civil enforcement action premised on the CWA.

The Federal Water Pollution Control Amendments of 1972, known collectively as the Clean Water Act, were crafted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2002). To achieve this ambitious goal, Congress mandated that "the discharge of any pollutant by any person shall be unlawful" except as in compliance with the Act's permitting procedures. *Id.* § 1311. The permitting scheme at issue in this case is articulated in section 404(a), which gives the Corps the authority "to issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Id.* § 1344(a). The CWA defines "navigable waters" to include "the waters of the United States, including the territorial seas," *id.* § 1362(7), and the Corps' regulatory jurisdiction is limited by this definition.

In 1985, the Supreme Court ruled that the Corps possessed the authority to exercise jurisdiction over wetlands that were adjacent to other waters, even though the wetlands themselves were not navigable waters-in-fact. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139, 106 S. Ct. 455 (1985). The Court deferred to the Corps' technical expertise on the matter, noting the considerable difficulty, both for the Corps and for federal courts, in defining the

jurisdictional limits of the Act. *Id.* at 132. The Court explained:

> In determining the limits of power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs -- in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Id. The Corps had determined that wetlands adjacent to other waters should be included in the definition of "waters of the United States," because "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water." *Id.* at 134-35. The Supreme Court upheld the Corps' exercise of jurisdiction, concluding, "We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States -- based as it is on the Corps' and the EPA's technical expertise -- is unreasonable." *Id.* at 134.

The Supreme Court has recently reaffirmed *Riverside Bayview Homes*, commenting: "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *SWANCC*, 531 U.S. at 167; *see also United States v. Krilich*, 303 F.3d 784, 791 (7th Cir. 2002) (observing that the *SWANCC* Court "reaffirm[ed] its prior holding [in *Riverside*

Bayview Homes] that Section 404 encompassed non-navigable wetlands adjacent to navigable waters," but "explicitly declined to further determine the exact meaning of 'navigable waters'"). In *SWANCC*, the Court struck down the Corps' so-called "Migratory Bird Rule," which defined "waters of the United States" to include intrastate waters, "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties; or . . . [w]hich are or would be used as habitat by other migratory birds which cross state lines . . . ." *SWANCC,* 531 U.S. at 164 (quoting 51 Fed. Reg. 41217). Quoting *Riverside Bayview Homes*, the Court held that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands '*inseparably* bound up with the "waters" of the United States.'" *Id.* at 167 (emphasis added). Thus, the Corps' attempted exercise of jurisdiction over isolated ponds that had no hydrologic connection whatsoever to navigable waters could not stand.[5]

Along similar lines, this court has previously held that the phrase "waters of the United States" cannot be used by the Corps to assert jurisdiction over intrastate, nonnavigable waters, solely on the ground that those waters could possibly affect interstate commerce. *United States v. Wilson,* 133 F.3d

---

[5] As is evident from the above discussion, Newdunn's insistence that *SWANCC* limited the Corps' jurisdiction solely to those wetlands adjacent to navigable waters-in-fact is plainly incorrect. Unlike the administrative regulation at issue in *Riverside Bayview Homes*, the "Migratory Bird Rule" before the Court in *SWANCC* was not developed to clarify the scientifically nebulous point "at which water ends and land begins." *Riverside Bayview Homes*, 474 U.S. at 134. Instead, the Corps' supposed justification for the rule was purely legal – that Congress drafted the CWA with the intention of defining "waters of the United States" as broadly as possible under the Commerce Clause. The Court rejected the Corps' interpretation of the CWA, recognizing that the Corps' Commerce Clause argument would read the phrase "navigable waters" completely out of the statute. *SWANCC*, 531 U.S. at 172.

251, 253-54 (4th Cir. 1997). We explained, "To include intrastate waters that have *nothing* to do with navigable or interstate waters, expands the statutory phrase 'waters of the United States' beyond its definitional limit." *Id.* at 257-58 (emphasis added). Accordingly, we struck down 33 C.F.R. § 328.3(a)(3), because it attempted to give the Corps jurisdiction over any waters, "the use, degradation or destruction of which could affect interstate or foreign commerce . . . ." *Id.* at 257 (quoting 33 C.F.R. § 328.3(a) (1993)). As we held in *Wilson*, and as the Supreme Court affirmed in *SWANCC*, the Corps' jurisdiction does not extend to the limits of the Commerce Clause. Rather, the critical, limiting term is 'navigable waters,' as that term is defined in 33 U.S.C. § 1362(7).

In the present case, the Corps asserts jurisdiction over navigable waters (33 C.F.R. § 328.3(a)(1)), tributaries of navigable waters (§ 328.3(a)(5)), and "[w]etlands adjacent to waters (other than waters that are themselves wetlands) . . ." (§ 328.3(a)(7)). The Corps defines "adjacent" to mean, "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c). This circuit has recently concluded that, pursuant to these regulations, the Corps intends to assert jurisdiction over "any branch of a tributary system that eventually flows into a navigable body of water." *United States v. Deaton,* 332 F.3d 698, 711 (4th Cir. 2003). In *Deaton*, the Corps claimed authority to regulate wetlands bordering a "roadside ditch" that took "a winding, thirty-two mile path to the Chesapeake Bay." *Id.* at 702. Along the way to the Bay, water flowed from the Deaton's wetlands to the roadside ditch, and then into a "culvert" on the other side of the road. *Id.* Water from the culvert drained into a second ditch, which flowed into Beaverdam Creek. Beaverdam Creek was "a direct tributary of the Wicomico River, which [was] navigable." *Id.* The

distance from the Deaton's wetlands to a navigable-in-fact river was approximately eight miles. The *Deaton* court upheld the Corps' exercise of jurisdiction over all of these waters, finding that "the Corps's regulatory interpretation of the term 'waters of the United States' as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress's power or alter the federal-state framework." *Id.* at 708. In dismissing a Commerce Clause challenge to the Corps' regulations, the *Deaton* court summarized Congress' well-articulated purpose for crafting the CWA and concluded, "The Corps has pursued this goal by regulating nonnavigable tributaries and their adjacent wetlands. This use of delegated authority is well within Congress's traditional power over navigable waters." *Id.* at 707. In sum, the Corps' unremarkable interpretation of the term "waters of the United States" as including wetlands adjacent to tributaries of navigable waters is permissible under the CWA because pollutants added to any of these tributaries will inevitably find their way to the very waters that Congress has sought to protect.

To the extent that Newdunn challenges the Corps' decision to label the manmade, I-64 ditch a "tributary," that argument has also been foreclosed by *Deaton*. The *Deaton* court recognized that the Corps has defined the word "tributary" to include "the entire tributary system," including roadside ditches. *Id.* at 710. As explained above, *Deaton* deferred to the Corps' definition of "tributary" because "discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters." *Id.* at 712. That the I-64 ditch at issue in the present case is a manmade rather than a natural watercourse is an irrelevant distinction. As the Corps has explained:

> The discharge of a pollutant into a waterway generally has the same effect downstream

> whether the waterway is natural or manmade. Indeed, given the extensive human modification of watercourses and hydrologic systems throughout the country, it would be difficult to identify a principled basis in this case for distinguishing between natural watercourses and watercourses that are wholly or partly manmade or modified.

(Br. for the United States at 48-49.) This observation is particularly meaningful in the present case, where the United States has extensively documented the connection between the Newdunn Property's wetlands and the navigable waters, both before and after the construction of I-64. Because of this long-standing connection, it would be illogical to conclude that, prior to the existence of I-64, the Newdunn Wetlands would have been within the ambit of the Corps' regulations, but that now, with the construction of the highway, the wetlands are no longer jurisdictional.

As stated before, the CWA's primary objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2002). If this court were to conclude that the I-64 ditch is not a "tributary" solely because it is manmade, the CWA's chief goal would be subverted. Whether manmade or natural, the tributary flows into traditional, navigable waters. Accordingly, the Corps may permissibly define that tributary as part of the "waters of the United States." *See* 33 U.S.C. § 1362(7).

Turning our attention to the specific wetlands at issue in this case, it is undisputed that water flows intermittently from wetlands on the Newdunn Property through a series of natural and manmade waterways, crossing under I-64, draining into the west arm of Stony Run, and eventually finding its way 2.4 miles later to traditional navigable waters.

As the district court found, Stony Run is "navigable-in-fact" because the "lower reaches of Stony Run are subject to the ebb and flow of the tide." The court further found that "Stony Run flows into the Warwick River, which intersects with the James River, which intersects with the Hampton Roads Harbor, which intersects with the Chesapeake Bay." These factual findings are supported in part by photographic evidence of silt-laden water flowing from the subject property into Stony Run. Because there exists a sufficient nexus between the Newdunn Wetlands and navigable waters-in-fact, the Corps' jurisdiction in this case is amply supported by the Act and the Corps' regulations under the Act.

IV.

For the reasons stated above, the ruling of the district court is reversed. We remand the Board's state enforcement action directly to the Virginia state court from which it was improperly removed. We remand the Corps' enforcement action to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 2:01cv508

United States of America,
Plaintiff,

v.

Newdunn Associates LLP, Orion Associates,
and Northwest Contractors Corporation
Defendants.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 4:01cv86

Dennis H. Treacy, Director
Commonwealth of Virginia
Department of Environmental Quality
And State Water Control Board,
Plaintiffs,

v.

Newdunn Associates LLP, Orion Associates,
and Northwest Contractors Corporation
Defendants.

April 3, 2002, Decided
April 3, 2002, Opinion Filed

OPINION BY: HENRY COKE MORGAN, JR., UNITED STATES DISTRICT JUDGE

OPINION:

OPINION AND ORDER

The parties come before the Court in these consolidated cases for a non-jury trial, seeking to resolve issues surrounding the Defendant's activities on the forty three (43) acre parcel of land located at the intersection of Industrial Park Drive and Jefferson Avenue in Newport News, Virginia (the "Property" or the "Newdunn Property"). At the conclusion of the trial on March 8, 2002, the Court ruled from the bench that the United States Army Corps of Engineers (the "Corps") did not have jurisdiction to regulate the Property. The Court also ruled that Plaintiff Dennis Treacy ("Treacy"), Director of the Virginia Department of Environmental Quality ("VDEQ"), acting on behalf of the State Water Control Board (the "Board"), possessed no jurisdiction over the Property independent of the Corps' claim of jurisdiction. This order further explains the reasoning of the Court's decision.

I. Factual and Procedural Background

Newdunn Associates, LLP ("Newdunn" or the "Defendants") is the owner of the Property at issue in this case. On May 21, 2001, the Corps issued a second jurisdictional determination that the Newdunn Property contained wetlands which are waters of the United States and any filling would require a "404 permit," pursuant to Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344(a). From approximately June 12, 2001 through July 12, 2001, Newdunn and/or persons acting on their behalf, conducted, contracted for, supervised and/or otherwise controlled the discharge of dredged or fill material onto the Newdunn Property without a permit under CWA section 404. On June 14, 2001 and June 16, 2001, the Corps issued a cease and desist order to the Defendants. On June 25, 2001, the Board issued Newdunn an Emergency Special Order ("ESO")

directing Newdunn Associates to cease all excavation on the Property. Believing that the Corps lacked jurisdiction over the Property and that their activities did not violate state law, the Defendants elected not to comply with these orders.

On July 6, 2001, the United States filed a Complaint in *United States v. Newdunn Associates, et. al.,* Civil Action No. 2:01cv508, seeking *inter alia* an injunction barring the Defendants from discharging dredged or fill material into the Property without a permit. On July 13, 2001, the Court granted the motion by the United States for a Temporary Restraining Order ("TRO") enjoining the Defendants from conducting any filling or related activity on the Property for a period of ten (10) days. On July 23, 2001, after conducting an evidentiary hearing and viewing the Property, the Court granted a Preliminary Injunction ("PI") with significant modifications to the July 13, 2001 TRO. With certain conditions regarding, amongst other things, the maintenance of a buffer strip of wetlands on the perimeter of the Property and the construction of a ditching system to minimize surface water runoff, the Court lifted the prohibition on the Defendant's activities. The Court indicated at that time that the paramount issue in this case was whether the Corps had jurisdiction to regulate the Property.

From late July, 2001 through approximately September 30, 2001, Defendants and/or persons acting on their behalf conducted, contracted for, supervised and/or otherwise controlled the use of mechanized land-clearing and earth moving equipment to discharge dredged or fill material into a portion of the wetlands on the Newdunn Property.

On July 30, 2001, the Court filed a written Order explaining the July 23, 2001 Preliminary Injunction. The Corps, unsuccessful in its attempt in this Court to enjoin Newdunn's filling activities, then conferred with the state regulatory body, the VDEQ. The day after the Court entered the Preliminary Injunction, Treacy notified Newdunn that it

could not excavate ditches on the Property[6] and followed this notice with a civil action in the Circuit Court of the City of Newport News, Virginia, seeking to enjoin the excavation ordered by this Court.[7] Prior to VDEQ's filing this state court claim, Newdunn filed *Newdunn Associates, L.L.P. v. Dennis H. Treacy and Bert W. Parolari, Jr.*, Civil Action No. 2:01cv575, in which Newdunn sought to enjoin Treacy and Parolari, as state officials, from proceeding with plans to seek injunctive relief in state court regarding Newdunn's ditching activities on the Property. On August 8, 2001, Newdunn also filed a petition to remove the state action to this Court, which had been designated *Dennis H. Treacy and State Water Control Board v. Newdunn Associates, L.L.P.*, Civil Action No. 4:01cv86.

In an Order entered in Civil Action No: 2:01cv575 on August 9, 2001, this Court issued a TRO enjoining Treacy and Parolari from instituting any proceeding in state court against Newdunn relating to activities authorized by the PI

---

[6] In July, 2001, the statute upon which the VDEQ relied, Va. Code § 62.1-44.5 and 62.1-44.15:5, did not prohibit the filling of wetlands. As conceded by the VDEQ, as of July, 2001, this statute only barred the excavation of wetlands. The portion of the statute prohibiting excavation became effective July 1, 2000 in accord with normal scheduling of effective dates by the Virginia legislature. However, the statute specifically contains a delayed effective date for the prohibition of filling wetlands until October 1, 2001, thereby intentionally creating a window of opportunity for owners, such as Newdunn, to fill property alleged to be wetlands.

[7] The City of Newport News had also previously and conditionally approved excavation on the Property as part of a drainage plan. When it was brought to the Court's attention that a more extensive ditching plan had been ordered by the City of Newport News, by modification of its Preliminary Injunction in Civil Action No. 2:01cv508, on August 22, 2001, the Court permitted the more extensively and presumably more scientifically sound system of ditching approved by the City of Newport News to be substituted for the Court's ditching plan.

and ordered them to appear and show cause why such state court proceeding would not be controlled by Civil Action No. 2:01cv508, which was pending in this Court. In a tele-conference hearing held on August 10, 2001, this Court rejected the state's request to dissolve or modify this TRO.

On August 8, 2001, Treacy and Parolari moved to dismiss *Newdunn v. Treacy, et. al.*, Civil Action No. 2:01cv575. On August 17, 2001, the United States filed a Motion to Enforce the Preliminary Injunction in *United States v. Newdunn, et. al.*, Civil Action No. 2:01cv508. On August 20, 2001, Newdunn moved in Civil Action No. 2:01cv575 to convert the August 9, 2001 TRO into a PI. The Court heard evidence and arguments on these interrelated motions on August 20, 2001.[8] In an Order filed August 22, 2001, the Court extended the TRO for an additional 10 days, ordered Newdunn to obtain a bond with sufficient surety or obtain an appropriate letter of undertaking from a bank in the principal sum of one-hundred and fifty thousand dollars to cover the potential cost of reversing its excavation activities and ordered a hearing upon Newdunn's request for a Preliminary Injunction be held on August 30, 2001. Further, the Court dismissed Parolari as a party to the suit.

On August 23, 2001, Treacy moved to remand Civil Action No. 4:01cv86 to the Newport News Circuit Court. The Court heard arguments on this motion as well as Newdunn's motion to convert the August 9, 2001 TRO to a Preliminary Injunction on August 30, 2001. In an Order filed

---

[8] At the August 20, 2001 hearing, counsel for VDEQ issued a thinly veiled threat that, should the Court lift the TRO, it would proceed with other legal actions against Newdunn, including possible criminal actions. When pressed further by the Court, VDEQ counsel, an Assistant Attorney General, refused to either confirm or deny that criminal action was contemplated. Given the complexities of these civil actions, the Court found that the threat of criminal proceedings placed Newdunn in an untenable position.

August 31, 2001 in Civil Action No:201cv575, the Court found preliminarily that (1) Treacy relied on the Corps' assertion of jurisdiction over the Property via the CWA in his attempt to assert jurisdiction to enjoin the excavation of ditches and, (2) Treacy's proffered evidence was insufficient to establish that Newdunn's filling and subsequent excavation activities authorized in the Court's July 30, 2001 Preliminary Injunction was in violation of state statute, Va. Code §§ 62.1-44.5 and 62.1-44.15:5, and (3) as of October 1, 2001, Treacy had independent jurisdiction over further filling activity provided that Treacy also had independent jurisdiction over the Property. Further, the Court converted the TRO into a Preliminary Injunction with modifications, and thereby enjoined Treacy from instituting any proceeding in state court against Newdunn related to activities authorized by the Corps' Preliminary Injunction issued by the Court on July 30, 2001 and modified on August 22, 2001 in Civil Action 2:01cv508. The Court set an expiration date for the Treacy Preliminary Injunction of October 1, 2001.

In an Order filed September 5, 2001 in Civil Action No. 4:01cv86, the Court again found that Treacy relied on the Corps' assertion of jurisdiction over the Property via the CWA in his attempt to assert jurisdiction to enjoin the excavation of ditches. In that Order the Court denied Treacy's Motion to Remand.

On October 4, 2001, the Board affirmed the Emergency Special Order ("ESO") and held that Newdunn was in violation of Va. Code § 62.1-44 *et seq.* The Board issued a Final Special Order ("FSO") on October 11, 2001 ordering Newdunn to cease its activities on the Property. Both the ESO and FSO listed as the first Finding of Fact that the Corps had jurisdiction over the Property under the CWA.

On October 26, 2001, Treacy moved for Voluntary Dismissal Without Prejudice of Civil Action No. 4:01cv86. On October 29, 2001, Newdunn moved to Consolidate Civil

Action No. 2:01cv 508 and Civil Action No. 4:01cv86. On November 7, 2001, Newdunn moved for a Preliminary Injunction to prevent VDEQ from taking any further state administrative actions involving Newdunn's activities on the Property before October 1, 2001. On November 7, 2001, Treacy moved for partial summary judgment against Newdunn on the issue of liability based upon the outcome of the state administrative hearings. The Court held a hearing on these matters on December 11, 2001. In an Order filed December 21, 2001, the Court adhered to its finding that Treacy's exercise of jurisdiction was dependent upon the Corps' alleged jurisdiction under the CWA. Further, the Court (1) denied Treacy's Motion to Voluntarily Dismiss without Prejudice Civil Action No. 4:01cv86, (2)granted Newdunn's Motion to Consolidate Civil Action No. 2:01cv 508 and Civil Action No. 4:01cv86, (3) declined to consider Treacy's Motion for Partial Summary Judgment because Treacy failed to file a statement of undisputed facts as required by Local Rule 56(B), and (4) denied Newdunn's Motion for Preliminary Injunction. Further, the Court ordered all parties to arrange a Settlement Conference with a Magistrate Judge of this Court. The Court ordered that each party be represented at said settlement conference by someone with authority to settle the case or that such a person be readily available via telephone during the conference.[9]

On February 1, 2002, the Corps filed a Motion for Partial Summary Judgment. On February 8, 2001, the Board issued a Supplemental Final Special Order ("SFSO") finding that Newdunn's activities on the Property prior to October 1, 2001 were in violation of state law. On February 13, 2002, Treacy filed a Motion for Summary Judgment based on this

---

[9] The Settlement Conference was held on January 24, 2002. The parties were unable to settle the matters before the Court.

SFSO. The Corps' Motion for Partial Summary Judgment and Treacy's Motion for Summary Judgment were not considered by the Court, as they did not mature within a reasonable time before the date of trial.

The bench trial in this case began on March 4, 2002. The Corps argued that a "surface water" or "hydrological" connection exists between the wetlands on the Property and other Waters of the United States, as defined in Corps' regulations, and therefore the Corps had jurisdiction over the Property. Treacy argued that Newdunn violated Va. Code §§ 62.1-44.15:5 and 62.1-44.5 and that Treacy possessed jurisdiction over the Property independent of the Corps. Newdunn contended that the Corps' regulations exceeded the authority granted under the CWA and, in the alternative, that the Corps did not properly exercise jurisdiction under their own regulations. Newdunn also argued that Treacy possessed no jurisdiction independently of the Corps and, in the alternative, Newdunn did not violate the state statute. The Court ruled from the bench on March 8, 2002. The court indicated it was ruling for the Defendants, but that it would not enter judgment until a written opinion and order was filed.

II. Findings of Fact

1. In September and October of 1997, the Williamsburg Environmental Group, Inc. ("WEG"), an environmental consulting firm, performed a wetland delineation on the Newdunn Property at the request of Newdunn Associates. WEG determined that most of the Property constituted wetlands.

2. In September of 1999, another environmental consultant, Doug Davis of Davis Environmental Consultants, acting on behalf of Newdunn Associates, requested a jurisdictional determination and confirmation of wetlands delineation from the Corps. On December 16, 1999, the Corps provided Newdunn with a formal jurisdictional

determination that the Property contained wetlands which it believed were subject to CWA jurisdiction. The Corps also confirmed the wetland delineation submitted by Davis at this time. A determination that a property contains wetlands is defined as a delineation in Corps regulations. A determination by the Corps that it has jurisdiction over wetlands previously delineated is a separate decision.

3. On May 21, 2001, before Newdunn began the filling activities, the Corps issued a second jurisdictional determination that the Property contained wetlands which are waters of the United States. Although the Supreme Court's decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers,* 531 U.S. 159, 121 S. Ct. 675 (2001) (*SWANCC*) was decided between the Corps' December 16, 1999 determination of jurisdiction and its May 21, 2001 determination, it looked at the same factors in both determinations.

4. Before Newdunn and its contractors commenced work on the Property in early June 2001, the Property contained approximately thirty-eight (38) acres of non-tidal forested wetlands.

5. From approximately June 12, 2001 through July 12, 2001, the Defendants and/or persons acting on their behalf, conducted, contracted for, supervised and/or otherwise controlled the discharge of dredged or fill material onto the Property. From about July 23, 2001 through approximately September 20, 2001, the Defendants and/or persons acting on their behalf, conducted, contracted for, supervised and/or otherwise controlled the discharge of dredged or fill material onto the Property. From early June, 2001 through September, 2001, the Defendants or persons acting on their behalf conducted, contracted for, supervised, directed and/or otherwise controlled the mechanized stumping, grading and/or grubbing of the Property. From late July, 2001 through September, 2001, the Defendants or persons acting

on their behalf conducted, contracted for, supervised, directed and/or otherwise controlled the mechanized excavation of ditches on the Property as indicated in the proposal dated May 11, 2001 which was executed by and between Orion and Newdunn and the "Drainage Improvements for Newdunn Associates, L.L.P." and submitted by Newdunn to the City of Newport News, Virginia. Newdunn conducted all of these activities without a permit under CWA § 404 or an individual or General Virginia Water Protection Permit under Va. Code §§ 62.1-44.15:5(D) and 62.1-44.5(A)(2).

6. Rain generated surface water runoff occasionally exits the Property through a spur ditch by the Property. There is no evidence of the frequency or volume of the surface water runoff. At prior hearings, the Corps had claimed a hydrological connection between the Property and Jones Run, as well as a hydrological connection between the Property and a branch of Stony Run located to the east of highway I-64. However, these alternate hydrological connections were not proven at any pretrial hearings and no evidence of either alternate connection was presented at trial. Further, at prior hearings, the Corps had claimed that surface water runoff contributed to flooding in a low lying residential area to the east of the Property. Obviously, maintaining the status quo, as urged by the Corps, would not alleviate this problem and it was not mentioned at the trial. Although reference was also made in pretrial hearings to damage to plant and animal life which occupied the wetlands on the Property, no evidence on this issue was presented at trial by the Corps. There was a mention in the State Board's February 8, 2002 Supplemental Special Final Order ("SFSO") of potential damage to plant and animal life, but neither the Corps nor Treacy asserted this as a basis for jurisdiction. Thus, the Corps' claim of jurisdiction is based solely upon the alleged surface water or hydrological connection of the Property to the navigable portion of Stony

Run and Treacy must base his claim of jurisdiction upon the enabling statute passed by the Virginia Legislature.

7. In order for the surface water which exits the Property to reach the navigable portion of Stony Run, it must traverse the following path:

> A. Enter the spur ditch leading from the Property through the adjacent VDOT wetlands approximately forty (40) feet to a manmade, drainage ditch lying adjacent and parallel to the east side of I-64 ("eastern I-64 ditch"). The eastern I-64 ditch is ephemeral, or dry most of the year.
>
> B. The surface water that continues through the eastern I-64 ditch intermittently travels approximately four hundred (400) feet in this ditch to a culvert, which runs under I-64.
>
> C. The surface water that continues through the culvert under I-64 intermittently travels approximately one hundred (100) feet through this culvert to another manmade, drainage ditch, which lies on the western side of I-64 ("western I-64 ditch").
>
> D. The surface water that continues through the western I-64 ditch intermittently travels approximately one and one third miles down the western I-64 ditch before intersecting the Western Arm of Stony Run.
>
> E. The Western Arm of Stony Run, including the point where surface water from the western I-64 ditch intermittently enters the Western Arm of Stony Run, is not navigable-in-fact.

F. The Western Arm of Stony Run intersects with the Central Arm of Stony Run approximately one thousand (1,000) feet from the point where surface water from the western I-64 ditch may intermittently enter the Western Arm of Stony Run.

G. Old Courthouse Road passes over Stony Run approximately one mile downstream from the point where surface water from the western I-64 ditch may intermittently enter the Western Arm of Stony Run.

H. Stony Run is only navigable-in-fact downstream of the Old Courthouse Road overpass. The lower reaches of Stony Run are subject to the ebb and flow of the tide. The upper limits of tidal influence reach the Old Courthouse Road overpass.

I. Stony Run flows into the Warwick River, which intersects with the James River, which intersects with the Hampton Roads Harbor, which intersects with the Chesapeake Bay.

8. The evidence shows that the wetlands contained on the Property were non-tidal high elevation hydric soil flats, which are qualitatively different and less functional than wetlands that lay closer to navigable, open water.

9. The Property averaged approximately forty six (46) feet above sea level in its natural state before any filling, ditching, grading or stumping activities began. It rested on one of the highest elevations in this generally low lying area. Thus, the wetlands on the Property did not serve to filter pollutants from I-64 or the surrounding area from entering

the Chesapeake Bay. Rather, when surface water did exit the Property, it actually traveled to the drainage ditches of I-64.

10. The Corps and Treacy have presented no evidence of any pollution, other than silt from "clean fill," exiting from the Property. There is no evidence that the silt exiting the Property as a result of Newdunn's activities on the Property actually reaches any natural watercourse or causes harm to the Chesapeake Bay or any of its "natural" tributaries.[10]

11. The Corps first promulgated regulations for the CWA on April 3, 1974 ("1974" or "old" regulations). Subsequently, it put forth revisions in 1975, 1977, and 1986 ("1986" regulations).

---

[10] In fact, the Corps' position may assist pollutants from I-64 entering the Chesapeake Bay. The Corps claims that it has jurisdiction over the Property because of a "surface water connection" from a ditch on the Property, to a drainage ditch on the eastern side of I-64, through a culvert under I-64, to a drainage ditch on the western side of I-64, to Stony Run, and, eventually, into the Chesapeake Bay. Under this scenario, the Corps only claims jurisdiction because of the existence of an alleged hydrological connection from I-64 to the Chesapeake Bay. Thus, in its quest to regulate the surface water and accompanying silt from the Property, the Corps has promoted and failed to alter the path of pollutants from I-64 to the Chesapeake Bay. Pollutants emanating from I-64 should potentially cause more damage to the Chesapeake Bay than the silt from the Property. Yet, in order to protect the Chesapeake Bay from these pollutants emanating from I-64, the Corps would have to alter the hydrological connection from I-64 away from a path that leads to the Chesapeake Bay. However, if it were to make such an alteration, the Corps would no longer have a "surface water" or "hydrological" connection from I-64 to the Chesapeake Bay. Without such a connection from I-64 to the Chesapeake Bay, the Corps would have to concede that it did not have jurisdiction over the Property and similar property which are allegedly connected to the Chesapeake Bay via the ditches or culverts of I-64. Thus by attempting to maintain the status quo with regard to the Property both the Corps and Treacy are risking damage to the Bay. It was for this reason that the Court vigorously and repeatedly urged the parties to negotiate a settlement.

12. The authority granted to the Corps by Congress has not been expanded since the Corps promulgated the 1974 regulations.

13. Both the 1974 and 1986 regulations share the definition for navigable waters: "The term 'navigable waters of the United States' and 'navigable waters,' as used herein mean those waters of the United States which are subject to the ebb and flow of the tide and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. 209.120(d)(1) (1974), 33 C.F.R. 321.2(a) (1986). Both sets of regulations include the same conditions that must be met to be considered a "navigable water."[11]

14. The 1986 regulations distinguish the applicability of the term "navigable waters" from the term "waters of the United States." The 1986 regulations state,

> "The terms 'navigable waters of the United States' and 'waters of the United States' are used frequently throughout these regulations, and it is important from the outset that the reader understand the difference between the two. 'Navigable waters of the United States' are defined in 33 C.F.R. Part 329. These are waters that are navigable in the traditional sense where permits are required for certain work or

---

[11] Specifically, the following conditions must be met:

"(1) Past, present, or potential presence of interstate or foreign commerce;

(2) Physical capabilities for use by commerce as in paragraph (a) of this section; and

(3) Defined geographic limits of the waterbody."

33 C.F.R. 209.260(b) (1974), 33 C.F.R. 329.5 (1986).

> structures pursuant to Section 9 and 10 of the Rivers and Harbors Act of 1899. 'Waters of the United States' are defined in 33 C.F.R. Part 328. These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to Section 404 of the Clean Water Act." 33 C.F.R. § 320.1(d) (1986).

The 1974 regulations make no such distinction.

15. The 1986 regulations state that the definition for "waters of the United States" applies to the authority of the Corps under the CWA. 33 C.F.R. § 328.1 (1986). It also clearly states that the definition for "navigable waters" "does not apply to authorities under the Clean Water Act . . ." 33 C.F.R. § 329.1 (1986). Again, there is no such distinction in the 1974 regulations.

16. The 1986 regulations define the term "waters of the United States,"[12] which it states applies to the CWA

---

[12] The 1986 regulations use the following definition for "waters of the United States":

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters;

(i.) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii.) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(Continued on following page)

jurisdictional limits, 33 C.F.R. § 328.1 (1986), in much broader terms than the definition for "navigable waters."

17. The 1974 regulations state under "General Policies" that, "[t]he term 'navigable waters of the United States' is used to define the scope and extent of the regulatory powers of the Federal government." 33 C.F.R. § 209.260(b)(1974). The 1986 regulations do not contain this statement.

18. In several places throughout the regulations, the 1986 regulations have substituted the term "waters of the United States," where the old regulations had used "navigable waters." These changes took place in otherwise identical sections of the new and old regulations. *See e.g.* 33 C.F.R. 209.120(b)(7) (1974) and 33 C.F.R. § 209.120(b)(7) (1986); 33 C.F.R. § 209.120(c) (1974) and 33 C.F.R. § 209.120(c) (1986); 33 C.F.R. § 209.120(d)(3) (1974) and 33 C.F.R. § 323.2(c) (1986); 33 C.F.R. § 209.120(e)(2) (1974) and 33 C.F.R. § 323.3(a) (1986).

19. The 1975 regulations, in its definition of "Navigable waters," includes "All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark." 33 C.F.R. 209.120(d)(2)(i)(e)

(iii.) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (1)-(6) of this section." 33 C.F.R. 328.3 (1986).

(1975).[13] The 1975 regulations further define "Primary

[13] The Corps has argued in this case that the spur ditch, the I-64 drainage ditches, and the culvert all qualify as "tributaries" to "waters of the United States," making these alleged tributaries also waters of the United States. However, the Corps has also expanded the definition of the term "tributary" since the 1974 regulations:

The 1974 regulations stated, "The term 'navigable waters of the United States' and 'navigable waters,' as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974).

The 1975 regulations stated, "(2) '*'Navigable waters.'*(i) the term 'navigable waters,' as used herein for purposes of Section 404 of the Federal Water Pollution Control Act, is administratively defined to mean waters of the United States . . . and shall include the following waters:

. . .

(e) All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark.

. . .

(i) Those other waters which the District Engineer determines necessitate regulation for the protection of water quality as expressed in the guidelines (40 CFR 230). For example, in the case of intermittent rivers, streams, tributaries, and perched wetlands that are not continuous or adjacent to navigable waters identified in paragraphs (a)-(h), a decision on jurisdiction shall be made by the District Engineer."

. . .

(ii) The following additional terms are defined as follows:

(e) '*Primary tributaries*' means the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries."

33 C.F.R. § § 209.120(d)(2)(i)(e) & (i) and (d)(2)(ii)(e) (1975).

The 1975 preamble stated, "With respect to the inland areas of the country, Corps jurisdiction under Section 404 of the FWPCA would extend to all rivers, lakes, and streams that are navigable waters of the United States, to all tributaries (primary, secondary, tertiary, etc.) of navigable waters of the United States, and to all interstate waters. . . . Drainage and irrigation ditches have been excluded . . .In view of

(Continued on following page)

manpower and budgetary constraints it is necessary that this program be phased in over a two year period. . . . Thus, under Phase I, this regulation would become immediately operative in all coastal waters and contiguous or adjacent wetlands as well as inland rivers, lakes and streams that are navigable waters of the United States . . . and their contiguous or adjacent wetlands. In Phase II, which would begin on July 1, 1976, we would . . . also begin to regulate discharges of dredged or fill material in primary tributaries (the main stems of tributaries directly connecting to navigable waters of the United States), their contiguous or adjacent wetlands, and all lakes. Finally, in Phase III, all discharges of dredged or fill material in navigable waters would be regulated after July 1, 1977." 40 Fed. Reg. 31,320-321 (1975).

The 1977 regulations stated, "(a) The term 'waters of the United States' means:

. . .

(3) Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition).

(4) Interstate waters and their tributaries, including adjacent wetlands;" 33 C.F.R. § 323.2(a)(3) and (4).

The 1982 regulations stated, "(a) The term 'waters of the United Sates' means []:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters;

(i.) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii.) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(Continued on following page)

tributaries" as "the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries." 33 C.F.R. § 209.120(d)(2)(ii)(e). The 1986 regulations do not have a definition of Primary tributaries, nor does it exclude "additional tributaries extending off of the main stems of these tributaries."

(iii.) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section.

33 C.F.R. 323.2(a)(5) (1982).

The 1986 preamble stated, "For clarification, it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(a) Non-tidal drainage and irrigation ditches excavated on dry land . . . [I]n the absence of wetlands the upstream limit of the Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible." 51 Fed. Reg. 41,217 (1986).

The 1990 preamble states, "The statement that non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing waters of the United States is consistent with the final rule published in the November 13, 1986 Federal Register and applies to ditches constructed in waters or that connect waters. Nothing in the NWP notice was intended to change the November 13, 1986 Federal Register notice which states that drainage ditches constructed entirely in upland areas generally are not considered to be waters of the United States." 65 Fed. Reg. 12,824-825 (2000).

20. The 1975 preamble to the regulations states, "With respect to the inland areas of the country, Corps jurisdiction under Section 404 of the FWPCA would extend to all rivers, lakes, and streams that are navigable waters of the United States, to all tributaries (primary, secondary, tertiary, etc.) of navigable waters of the United States, and to all interstate waters." 40 Fed. Reg. 31,320-21 (1975).

21. The 1977 regulations stated that "Waters of the United States" means: "Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition). . . .[and] Interstate waters and their tributaries, including adjacent wetlands." 33 C.F.R. 323.2(a)(3) and (4) (1977).

22. The 1982 regulations further expanded the definition of "Waters of the United States".[14] *See* 33 C.F.R. 323.2(a)(5) (1982).

---

[14] The 1982 regulations use the following definition for "waters of the United States":

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters;

(i.) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii.) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(Continued on following page)

23. The 1986 regulations include the following passage in the preamble: "For clarification, it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. . .

(a) Non-tidal drainage and irrigation ditches excavated on dry land." 51 Fed. Reg. 41,217 (1986).

24. As noted in the Court's Order of December 21, 2001, the VDEQ continually relied on the Corps' claim of jurisdiction in its attempts to regulate the Property. In a letter dated July 31, 2001 to Newdunn's counsel, VDEQ counsel wrote that VDEQ "will continue to view the wetlands on [the Property] as wetlands subject to [state regulations] until Newdunn demonstrates that the property no longer contains wetlands, *either with a final determination from the Corps or court* that the activities that removed or covered the previously existing wetland parameters were *either authorized by the Corps or not subject to its jurisdiction or the jurisdiction of the Board.*" (emphasis added).

25. In the Emergency Special Order issued by the VDEQ on June 25, 2001, which ordered Newdunn not to excavate, the first Finding of Fact is that the Corps had determined that the Property is comprised of "jurisdictional wetlands subject to regulation under the CWA."

(iii.) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section.

33 C.F.R. 323.2(a)(5) (1982).

26. Even after the Court issued its August 31, 2001 Order, the VDEQ repeated this finding. After the October 4, 2001 hearing, the Board stated in a "Final Special Order" as its first Finding of Fact that "On December 16, 1999, the U.S. Army Corps of Engineers (ACOE) notified Newdunn Associates that it had determined that the majority of the Facility is comprised of jurisdictional wetlands subject to regulation under the Clean Water Act."

27. Not until the Board entered a Supplemental Special Final Order ("SFSO") on February 8, 2002, only weeks before trial, did the Board omit reference to its dependence upon Corps jurisdiction under the CWA.

III. Conclusions of Law

1. The paramount issue in this case is whether the Corps has jurisdiction under the CWA and its regulations interpreting the Act over the wetlands on the Property under the holding in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455 (1985) (*Riverside*), in light of *SWANCC*.

2. The CWA was passed in 1972 in reaction to incidences involving heavily polluted waters, such as the burning of the Cuyahoga River cited in *SWANCC*, 531 U.S. at 175 (Stevens, J. dissenting). The overarching goal of the Act was "ending water pollution by 1985." *Id.* Following *Riverside*, courts generally allowed the act's jurisdiction to expand through Corps regulations and interpretation thereof until January of last year when the decision in *SWANCC* was announced. *SWANCC* recognized there is a limit to the Corps' unilateral expansion of the jurisdiction that the CWA conferred upon it.

3. The Supreme Court in *SWANCC* stated that "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so." *Id.*

at 172. Justice Stevens cogently, if disapprovingly, described the effect of *SWANCC* when he wrote in his dissent, "[T]he Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps assertion of jurisdiction over all waters except for actually navigable waters, their tributaries and wetlands adjacent to each." *Id.* at 176.

4. Justice Stevens also observed that *SWANCC* had the effect of excluding, amongst other waters, tributaries and wetlands that are not contiguous or adjacent to navigable waters from the scope of the Corps' jurisdiction. *Id.* at 188, fn. 14. Justice Stevens discussed three "phases" of waters. "Phase 1" waters, which are navigable waters and their contiguous wetlands, and "phase 2" waters, which are the "primary tributaries"[15] of navigable waters and their adjacent wetlands, were still subject to the Corps regulation after *SWANCC* according to Justice Stevens. However, "phase 3" waters, which are "all other waters covered by the statute, and can include such isolated waters as intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters," *Id.* at 188 (internal quotations omitted), were excised from the scope of the CWA by the *SWANCC* decision. *Id.* at fn. 14.

5. *SWANCC* also called the 1986 regulations into question. The Supreme Court expressly refused to give deference to the Corps' regulations. *SWANCC*, 531 U.S. at

---

[15] The Corps' 1975 regulations define "Primary tributaries" as "the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries." 33 C.F.R. 209.120(d)(2)(ii)(e).

170, 174.[16] According to the Supreme Court, "The Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with its new regulations." *Id.* at 168 (emphasis in original). In those original regulations, the 1974 regulations, the Supreme Court pointed out that the Corps "emphasized that '[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor [in deciding jurisdiction].' 33 C.F.R. § 209.260(e)(1)." *Id.* The Supreme Court noted that there was nothing in the legislative history to signify that "Congress intended to exert anything more than its commerce power over navigation." *SWANCC,* 531 U.S. at 168 n.3.

6. Even before *SWANCC* was decided, the Fourth Circuit held that the Corps exceeded its authority under the CWA. In *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), the Fourth Circuit held that the Corps exceeded its congressional authorization under the CWA when it promulgated 33 C.F.R. § 328.3(a)(3),[17] defining "waters of the United States" to

---

[16] "We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference." *SWANCC*, 531 U.S. at 174.

[17] 33 C. F.R. § 328.3(a)(3) defines "waters of the United States" to include:

"All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which *could affect* interstate or foreign commerce including any such waters;

(i.) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii.) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(Continued on following page)

include intrastate waters which need not have anything to do with navigable or interstate waters. Therefore, the Fourth Circuit held that 33 C.F.R. § 328.3(a)(3) is invalid. The Fourth Circuit stated, "Absent a clear indication to the contrary, we should not lightly presume that . . . Congress authorized the [Corps] to assert its jurisdiction in such a sweeping and constitutionally troubling manner. Even as a matter of statutory construction, one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." *Wilson,* 133 F.3d at 257.

7. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC,* 531 U.S. at 172. This requirement stems in part from the assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. *Id.* Additionally, the Corps has re-interpreted its authority under the CWA several times since its passage, further pushing the limit of congressional authority with each new set of regulations. Therefore, at least as to its 1986 and later adopted regulations, the Corps is not entitled to administrative deference under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).[18]

(iii.) Which are used or could be used for industrial purpose by industries in interstate commerce." (Emphasis in *Wilson*, 133 F.3d at 257).

[18] The "phases" discussed by Justice Stevens in his *SWANCC* dissent, 531 U.S. at 188, fn. 14, are identical to the "phases" outlined in the preamble to the 1975 regulations. 40 Fed. Reg. 31,320-21 (1975). The fact that Justice Stevens also uses pre-1986 regulations in interpreting the scope of the CWA further supports the contention that only pre-1986 regulations are entitled to administrative deference under *Chevron*.

8. The Corps has not carried its burden of factually proving a sufficient connection between the wetlands on the Property and navigable waters or waters of the United States. Surface water leaving the Property must pass through miles -- via (1) a spur ditch; (2) the eastern, manmade I-64 drainage ditch; (3) a culvert under I-64; (4) the western, manmade I-64 drainage ditch (portions of which were indisputably constructed through "dry lands"); and (5) non-navigable parts of Stoney Run -- before finding navigable waters. The Corps argued that each segment of this path qualified as "waters of the United States" under the 1986 regulations. The Corps relied at trial exclusively on this "surface water connection" or "hydrological connection" for jurisdiction, although neither of those terms are included in even the 1986 regulations. Further, were the Court to allow this "surface water connection" to suffice for jurisdiction, any property connected by a drainage pipe or culvert to navigable waters would fall under the Corps' jurisdiction, for the Corps argues that a culvert or storm drainage pipe connection from wetlands to a tributary to navigable waters is a sufficient surface water or hydrological connection. In fact, it argues that a culvert or storm drainage pipe meets its newest definition of a tributary. The arbitrariness of this position is illustrated by the Corps' evidence regarding the wetlands east of Jefferson Avenue, which were historically a portion of the wetlands on the Property but whose hydrological or surface water connection was severed by the construction of Jefferson Avenue. The Corps evidence opines that Jefferson Avenue severs this connection and thereby eliminates the easterly wetlands from Corps jurisdiction since there is no culvert connecting them to the Property. Such a rule leads to situations where wetlands which otherwise would be under Corps jurisdiction are rendered non-jurisdictional by the construction of a road or other manmade obstruction. Conversely, should a storm drain be installed under Jefferson Avenue the easterly wetlands would be hydrologically

reconnected to the Property and allegedly become jurisdictional. Thus, wetlands could alternately become jurisdictional or non-jurisdictional in tandem with adjacent road and storm drainage construction.

9. Even if the Corps had proven factually that under the 1986 regulations the wetlands on the Property would be considered jurisdictional, these rules which it seeks to apply have far exceeded the grant of authority by Congress in the CWA. The multiple changes the Corps has made to its CWA regulations have substantially increased the reach of its regulatory powers. For example, the 1974 regulations used the term "navigable waters of the United States" to define "the scope and extent of the regulatory powers" of the Corps. 33 C.F.R. § 209.260(b) (1974). The Corps used a limited definition for "navigable waters of the United States," which restricted their jurisdiction to waters which "are subject to the ebb and flow of the tide and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974). However, by 1986, the Corps had distinguished the terms "navigable waters" and "waters of the United States," 33 C.F.R. § 320(d) (1986), given the term "waters of the United States" a far more expansive definition than "navigable waters," 33 C.F.R. § 328.1 (1986), and determined that the more expansive "waters of the United States" would now define the scope of their jurisdiction under the CWA. *Id.* In adopting these changes, it usurped Congress' authority to determine the Corps' jurisdiction. Additionally, the Corps replaced the limited term "navigable waters" with the expansively defined term "waters of the United States" in several other places throughout the regulations, further expanding its own jurisdiction. *See e.g.* 33 C.F.R. 209.120(b)(7) (1974) and 33 C.F.R. § 209.120(b)(7) (1986); 33 C.F.R. § 209.120(c) (1974) and 33 C.F.R. § 209.120(c) (1986); 33 C.F.R. § 209.120(d)(3)

(1974) and 33 C.F.R. § 323.2(c) (1986); 33 C.F.R. § 209.120(e)(2) (1974) and 33 C.F.R. § 323.3(a) (1986).

10. Although the 1986 regulations state that the Corps generally excludes non-tidal drainage and irrigation ditches excavated on dry land from its definition of tributaries over which it asserts jurisdiction, it reserves the power to claim jurisdiction over such ditches on a "case-by-case basis." 51 Fed. Reg. 41,217 (1986). In other words, the 1986 regulations have expanded the Corps' power to the point where it may give itself jurisdiction even over the waters that the regulations define as generally not qualifying under the expansively-defined term "water of the United States." The Corps does not indicate in the regulations how it will go about making such a "case-by-case" determination. Thus, there are no definable limits to the Corps' definition of tributaries over which it possesses jurisdiction. *See Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S. Ct. 2294 (1972) (stating that due process requires insufficiently clear regulations be held void for vagueness); *See also Bullfrog Films, Inc. v. Wick,* 847 F.2d 502, 514 (9th Cir. 1988) (holding that United States Information Agency ("USIA") regulations were unconstitutionally vague because "The regulations enable USIA officials to act in an arbitrary and discriminatory manner in granting or denying permits and still be completely within the scope of their regulations . . . This kind of unfettered discretion is patently offensive to the notion of due process.") (internal quotations omitted).

11. The legislative power is vested in Congress. It cannot be abdicated or transferred to others. Separation of Powers between the three branches of government requires that the enactment of a statute be a legislative function which cannot be transferred to an administrative body. Since promulgating the 1974 regulations, Congress has not passed a statute granting the Corps any additional authority under the CWA. However, by dramatically expanding its own authority

through amendments to its own regulations, the Corps has in effect amended the CWA, thereby usurping the power of Congress. While expanding its authority through new regulations may be more expedient than convincing Congress to do so through properly enacted legislation, it is not permissible for the Corps to take a shortcut by continually redefining regulatory terminology and therefore its own jurisdiction.

Albeit speaking in dissent, the language chosen by Circuit Judge Widener in *United States v. Baker,* 45 F.3d 837, 850 (4th Cir. 1995) is instructive. Judge Widener stated:

> "The Virginia Court, in addressing the delegation of legislative power, has addressed the importance of not approving shortcuts on account of administrative convenience, and we should heed that admonition. In *Thompson v. Smith,* 155 Va. 367, 154 S.E. 579, 584 (1940), the Court stated:
> It is a fundamental principle of our system of government that the rights of man are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principal ought not to be surrendered for convenience or in effect nullified for the sake of expediency."

12. The Court **FINDS** that when Congress passed the CWA, it did not intend for the Corps to greatly expand what qualifies as jurisdictional waters of the United States. In addition, the Court **FINDS** that when Congress passed the CWA, it was not Congress's intent to vest the discretion in the Corps to decide on a case-by-case basis which ditches constructed partially through dry lands and which culverts should be defined as tributaries to waters of the United

States.[19] However, under 51 Fed. Reg. 41,217 (1986), this is precisely the scope of authority the Corps has granted itself.

13. The Corps, in exerting jurisdiction over the wetlands on the Property, has exceeded the authority granted to it by Congress. The Supreme Court in *SWANCC* made it clear that the 1974 regulations, promulgated two years after the CWA's enactment, are more consistent with the intent of Congress. *SWANCC.* 531 U.S. at 168. These regulations focused on "navigable waters" and the "water body's capability of use by the public for purposes of transportation or commerce." 33 C.F.R. §§ 209.120(d)(1), 209.260(e)(1) (1974). The Supreme Court noted that Congress intended to only exert its "commerce power over navigation." *SWANCC*, 531 U.S. at fn 3. In the case at bar, only by multiple drainage ditches, a culvert under a highway, and miles of non-navigable waters, are the wetlands on the Property even remotely connected to navigable waters or a water body capable of use by the public for purposes of transportation or commerce. Further, the wetlands on the Property bear no relation to the commerce power over navigation. Therefore, the Court **FINDS** that the wetlands on the Property fall outside the scope of the CWA.

14. The Court agrees with the sweep of *SWANCC* as explained in the dissent written by Justice Stevens and joined by three other Justices. Although not essential to the holding,

---

[19] It is noteworthy that in closing argument counsel for the Corps relied on the "case by case" language from the 1986 definition of tributaries. The argument was generally that although the evidence clearly proved that the ditch abutting the westerly side of I-64 was constructed partially through dry land, the Corps had jurisdiction over this link to the Property because it had determined that jurisdiction was appropriate "in this case." The preamble to the 1990 definition of tributaries specifies that such ditches are jurisdictional unless they are ". . . constructed entirely in upland areas . . ." 65 Fed. Reg. 12,824-825 (2000). It appears that even the Corps own attorneys have difficulty in keeping pace with these ever-changing regulations.

Justice Stevens opined that *SWANCC* excluded wetlands and tributaries that are not contiguous or adjacent to navigable waters from the scope of the Corps' jurisdiction. *SWANCC*, 531 U.S. at 188, fn. 14. The wetlands on the Property are not adjacent to navigable waters by any reasonable definition of adjacency. Further, the Corps argues that the spur ditch, the two I-64 drainage ditches and the culvert under I-64 qualify as tributaries. However, even if the Court were to accept the 1986 regulations and find that the ditches and culvert can be so defined, none of these alleged tributaries are contiguous or adjacent to navigable waters or waters of the United States. Thus, the Court **FINDS** that *SWANCC* alone eliminates any claim of jurisdiction by the Corps in this case under any permissible interpretation of the facts as presented by the Corps.

15. As in the Fourth Circuit's holding in *Wilson*, the Army Corps of Engineers exceeded its congressional authorization under the CWA. In this case, the Corps did not have congressional authorization to regulate the wetlands on the Property. Accordingly, the Court **FINDS** that the Corps did not have jurisdiction to regulate the wetlands on the Newdunn Property and Newdunn was not required to obtain a permit under the CWA prior to conducting the activities delineated in the Corps' Complaint.

16. In determining whether the Court has jurisdiction to decide if Treacy and the Board possessed jurisdiction over the Property, the Court **FINDS** that the nature and timing of Treacy's filing of *Treacy v. Newdunn*, Civil Action No. 4:01cv86, establishes that this filing was in reaction to this Court's issuance of a Preliminary Injunction in *United States v. Newdunn*, Civil Action No. 2:01cv508. Further, since, in determining this issue, the Court must decide whether the Board's jurisdiction is dependant on that of the Corps, the paramount issue in the two cases are identical and judicial economy encourages consolidation.

17. The holding in *SWANCC* affirms that the State has broader authority to regulate wetlands within its borders than does the Corps under the CWA. However, in this case, Treacy has been unable to show that the Virginia Legislature has, at this time, granted regulatory authority independently of the Corps' jurisdiction.

18. The enabling legislation relied on by Treacy, Va. Code 62.1-44.5 and 62.1-44.15:5 (the "state statute"), was adopted prior to the Supreme Court's decision in *SWANCC*, when many federal courts had interpreted the reach of the Corps' jurisdiction more broadly than that permitted under *SWANCC*'s holding. Therefore, it was logical at the time the Virginia legislature passed this statute to base its jurisdiction upon the Corps' seemingly unlimited jurisdiction.

19. The state statute defines wetlands as land so delineated by the Corps and over which the Corps has jurisdiction. The statute reads in part, "Any delineation accepted by the U.S. Army Corps of Engineers as sufficient in its exercise of jurisdiction pursuant to § 404 of the Clean Water Act shall be determinative of the geographic area of that delineated wetland." Va. Code § 62.1-44.15:5(D).

20. Va. Code § 62.1-44.15:5(A) states, "Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act."

21. Va. Code § 62.1-44.15:5(B) states, "The Board shall, after providing an opportunity for public comment, issue a Virginia Water Protection Permit if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act . . ."

22. The term "wetlands" is defined identically by state statute as by the Corps' regulations. 33 C.F.R. § 328.3(b) and Va. Code § 62.1-44.3 defines "Wetlands" as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to

support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."

23. The language in the state statute defining wetlands as land so delineated by the Corps and over which the Corps has jurisdiction under the CWA, Va. Code § 62.1-44.15:5(D), and establishing the permitting process as coexistent with the permit required under the CWA, Va. Code §§ 62.1-44.15:5(A) and (B), makes it clear that the state statute is coextensive with the CWA.

24. The fact that the term "wetlands" is defined identically by the state statute as by the Corps regulations, 33 C.F.R. § 328.2(b) and Va. Code § 62.1-44.3, supports this interpretation of the state statute.

25. The language used by the VDEQ and the Board proves that they have been consistently relying on the jurisdiction of the Corps in asserting state jurisdiction. In a letter dated July 31, 2001 to Newdunn's counsel by VDEQ counsel, the VDEQ explicitly based its jurisdiction on the Corps' jurisdiction. In both the Emergency Special Order issued on June 25, 2001 and Final Special Order issued on October 4, 2001, the VDEQ used the Corps' claim of jurisdiction over the Property as its first Finding of Fact, on which it based its own jurisdiction. Surprisingly, the October 4, 2001 Final Special Order used this language even after the Court discussed the VDEQ's apparent dependence on Corps' jurisdiction in its August 31, 2001 Order. There was no reason for the VDEQ to repeatedly use this language unless Treacy was relying on it in asserting jurisdiction.

26. The fact that weeks before trial, on February 8, 2002 the Board issued a Supplemental Final Special Order that for the first time omitted this language is unpersuasive. By that time, the Court had cited this language in several Orders and at several hearings for the proposition that Treacy's actions

were dependent upon the Corps' jurisdiction, in spite of the arguments of Treacy's counsel to the contrary. This omission at such a late date demonstrates that the language was important to the Board's prior decisions, and appears to be an effort to circumvent the prior findings of the Court on this issue.

27. Therefore, the actions of and language used by the VDEQ and the Board support the Court's interpretation of the statute as granting the state jurisdiction coextensive with Corps jurisdiction under the Clean Water Act.

28. Accordingly, the Court **FINDS** that Treacy and the Board exercised the State's jurisdiction over the Property based on the Corps' claim that the Property contains jurisdictional wetlands under the CWA.

29. Having found that the Corps has no jurisdiction, it follows that the Court **FINDS** that Treacy, acting on behalf of the Board, has no jurisdiction.

30. Having found Treacy and the Board lack jurisdiction, the Court **DECLINES** Newdunn's request to decide whether its activities constituted a violation of the state's regulatory statute. The Court also **DECLINES** to consider the constitutionality under state law of the state regulatory scheme, an issue which Newdunn raised for the first time at trial. Both of these issues are better left to the appropriate state court or agency.

31. Since neither the Corps, nor Treacy and the Board, have jurisdiction over the wetlands on the Newdunn Property, the Court **ENTERS JUDGMENT** for the **DEFENDANTS.**

IV. Summary

Congress passed the CWA in 1972. The Corps adopted regulations interpreting that act in 1974. Although since 1972 Congress has not granted the Corps additional jurisdiction,

the Corps has made multiple changes to its original regulations expanding its jurisdiction. The 1986 regulations adopted by the Corps substantially expanded the definition of jurisdictional waters and, in doing so, granted itself dramatically more authority. In making these changes, it usurped Congress' authority to determine the Corps' jurisdiction. Accordingly, the Court **FINDS** that the Corps did not have authority under the CWA to adopt the 1986 regulations or any regulations adopted thereafter since the 1986 regulations are not entitled to administrative deference under *Chevron,* 467 U.S. 837.

The Court **FINDS** that the Corps did not have jurisdiction over the Property under the regulations existing prior to 1986. Further, the majority opinion in *SWANCC* makes it clear that the Supreme Court excised the Property from the scope of the CWA, even under the 1986 regulations, as the wetlands on the Property are not adjacent to navigable waters or waters of the United States by any reasonable definition of adjacency.

Accordingly, the Court **FINDS** that even under the 1986 regulations as interpreted by *SWANCC*, the Corps still has not proven a sufficient connection between the property and navigable waters or waters of the United States to establish jurisdiction over the Property.

Therefore, the Court **FINDS** that the Corps lacks jurisdiction under the CWA to regulate the Property.

It may well be that the Corps' amendments to its regulations are meritorious in attempting to protect the environment, although in this instance, the Corps' interpretation of its jurisdiction is more likely to harm than help the Chesapeake Bay. However, the fact that the Corps has a meritorious scientific basis for expanding its jurisdiction in an effort to protect the environment does not authorize it to usurp the function of the legislative branch for

the sake of expediency. It is incumbent upon the Courts to prevent the Corps from shortcutting the legislative process.

The enabling legislation relied on by Treacy was adopted prior to the Supreme Court's decision in *SWANCC*, when many Federal Courts had interpreted the reach of the Corps' jurisdiction more broadly than that permitted under *SWANCC*'s holding. The language of the state statute makes it clear that the statute granting the state jurisdiction is coextensive with the CWA. The actions of and language used by the VDEQ and the Board further supports this interpretation of the state statute. The Court **FINDS** that Treacy and the Board sought to exercise the State's jurisdiction over the Property based on the Corps' claim that the Property contains jurisdictional wetlands under the CWA. In determining the question of the Court's jurisdiction to decide this issue, the Court **FINDS** that the nature and timing of Treacy's filing of *Treacy v. Newdunn*, Civil Action No. 4:01cv86, establishes that this filing was in reaction to this Court's issuance of a Preliminary Injunction in *United States v. Newdunn*, Civil Action No. 2:01cv508. Further, since the Board's jurisdiction is dependant on that of the Corps, the paramount issue in the two cases is identical and judicial economy encourages consolidation. Having found that the Corps has no jurisdiction, it follows that the Court **FINDS** that Treacy, acting on behalf of the Board, has no jurisdiction. Having found Treacy and the Board lack jurisdiction, the Court **DECLINES** Newdunn's request to rule upon the issue of whether its activities constituted a violation of the state's regulatory statute. This issue is better left to the appropriate state agency or court. The state court is also the more appropriate forum to decide the constitutionality under state law of the state regulatory scheme, an issue which Newdunn raised for the first time at trial.

Since neither the Corps, nor Treacy and the Board, have jurisdiction over the wetlands on the Newdunn Property, the Court **ENTERS JUDGMENT** for the **DEFENDANTS**.

The Clerk is **REQUESTED** to send a copy of this Order to all counsel of record.

It is so **ORDERED**.

HENRY COKE MORGAN, JR.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
April 3rd, 2002

33 U.S.C. § 1251 Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter --

* * *

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States. It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

(g) Authority of States over water. It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to

quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1311 Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

33 U.S.C. § 1344 Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites. The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites. Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

* * *

(g) State administration.

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

* * *

33 U.S.C. § 1362 Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any

pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

33 C.F.R. § 328.3 Definitions

For the purpose of this regulation these terms are defined as follows:

(a) The term waters of the United States means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

* * *

(b) The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

* * *

(e) The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

* * *

33 C.F.R. § 328.4 Limits of jurisdiction

* * *

(c) Non-Tidal Waters of the United States. The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or

(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.

(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

Supreme Court, U.S.
FILED
JAN 30 2004
OFFICE OF THE CLERK

No. 03-637

In the Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
GREER S. GOLDMAN
KATHERINE J. BARTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether wetlands that are connected to traditional navigable waters by intermittent surface water flows through ditches and streams are part of "the waters of the United States" within the meaning of the Clean Water Act, 33 U.S.C. 1362(7), where the ditches rerouted a pre-existing natural surface hydrologic connection between the wetlands and traditional navigable waters.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967)	9
Headwaters, Inc. v. *Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001)	11
International Paper Co. v. *Ouellette*, 479 U.S. 481 (1987)	2
Needham, In re, No. 02-30217, 2003 WL 22953383 (5th Cir. Dec. 16, 2003)	15, 16
Oklahoma ex rel. Phillips v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941)	11
Rice v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001)	13, 14, 17
Solid Waste Agency of Northern Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001)	3, 10, 11
United States v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), petition for cert. pending, No. 03-701 (filed Nov. 10, 2003)	7, 9, 11, 17, 21
United States v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003), petition for cert. pending, No. 03-929 (filed Dec. 22, 2003)	11
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)	2, 3, 9, 10, 12, 21
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993)	9

Statutes and regulations: Page

Federal Water Pollution Control Amendments of 1972, 33 U.S.C. 1251 *et seq.* 1
§ 301, 33 U.S.C. 1311 6
§ 301(a), 33 U.S.C. 1311(a) 2
§ 402, 33 U.S.C. 1342 4
§ 404, 33 U.S.C. 1344 6
§ 404(a), 33 U.S.C. 1344(a) 3
§ 404(b), 33 U.S.C. 1344(b) 4
§ 404(c), 33 U.S.C. 1344(c) 4
§ 502, 33 U.S.C. 1362 2-3
§ 502(7), 33 U.S.C. 1362(7) 2
§ 502(12), 33 U.S.C. 1362(12) 2
§ 502(14), 33 U.S.C. 1362(14) 17, 18
Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.* 13
33 U.S.C. 2701(21) 13
33 U.S.C. 2702(a) 13
33 C.F.R.:
Section 328.3 3
Section 328.3(a) 4
Section 328.3(a)(1) 3, 4
Section 328.3(a)(5) 4
Section 328.3(a)(7) 4
Section 328.3(e) 18
Section 328.4(c) 18
Section 330.2(d) 20
40 C.F.R.:
Section 230.3(s) 4
Section 230.3(s)(1) 4
Section 230.3(s)(5) 4
Section 230.3(s)(7) 4

Miscellaneous:

	Page
42 Fed. Reg. 37,128 (1977)	9
51 Fed. Reg. 41,217 (1986)	18, 19
65 Fed. Reg. (2000):	
pp. 12,818-12,819	20
pp. 12,283-12,824	19

In the Supreme Court of the United States

No. 03-637

NEWDUNN ASSOCIATES, LLP, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 344 F.3d 407. The opinion of the district court (Pet. App. 20a-56a) is reported at 195 F. Supp. 2d 751.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2003. The petition for a writ of certiorari was filed on October 27, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States Army Corps of Engineers brought this civil enforcement action under the Federal Water Pollution Control Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1251 *et seq.*, alleging that

petitioners had violated the CWA by discharging dredged or fill material into "waters of the United States" without a permit. The district court ruled in favor of the petitioners, holding that the wetlands into which the discharges had been made were not part of "the waters of the United States" within the meaning of the CWA, and that petitioners' conduct therefore was not subject to federal regulatory authority. Pet. App. 20a-56a. The court of appeals reversed and remanded for further proceedings. *Id.* at 1a-19a.

1. Section 301 of the Clean Water Act prohibits the "discharge of any pollutant by any person," unless in compliance with the Act. 33 U.S.C. 1311(a). "Discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense.").[1] In *Riverside Bayview*,

[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C.

the Court upheld the assertion by the United States Army Corps of Engineers (Corps) of regulatory authority, under the CWA, over "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction." 474 U.S. at 135.

In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), this Court again construed the CWA term "waters of the United States." The Court in *SWANCC* held that use of "isolated" nonnavigable intrastate waters by migratory birds was not a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172. The Court stated, however, that "it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

2. The CWA sets up two complementary permitting schemes. Section 404(a) authorizes the Secretary of the Army, acting through the Corps, or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Under

---

1362 and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

Section 402, any discharge of pollutants other than dredged or fill material must be authorized by a permit issued by the United States Environmental Protection Agency (EPA) (or a State with an approved program) under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1342. The Corps and EPA share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (c).

The Corps and EPA have promulgated identical regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). The definition, as it relates to this case, encompasses, *inter alia*, traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "tributaries" to traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to traditional navigable waters or their tributaries, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).

3. In 1978, petitioner Newdunn Associates purchased 43 acres of land (the Newdunn Property) located in Newport News, Virginia. It is undisputed that, prior to petitioners' filling and excavation activities, the Newdunn Property included approximately 38 acres of "wetlands" as that term is defined in the Corps' regulations. Pet. App. 4a, 28a.

Historically, the wetlands on the Newdunn Property had a natural hydrologic connection to the west arm of Stony Run, a natural stream, which flows into the central arm of Stony Run, a traditional navigable water. The construction of Interstate 64 (I-64) rerouted that natural hydrologic connection. The flow of water from

the wetlands on the Newdunn Property was intercepted by a ditch on the east side of I-64 that was constructed in part through the wetlands. Pet. App. 4a, 30a-31a. As a result, water now flows intermittently from the Newdunn Property wetlands through approximately 1.4 miles of ditch paralleling I-64 before it reaches the west arm of Stony Run, a natural stream. From there the water flows approximately 0.2 miles (1000 feet) to the central arm of Stony Run, which becomes a traditional navigable water approximately 0.8 miles downstream. The central arm of Stony Run flows into the Warwick River, which flows to the James River, which flows into the Hampton Roads Harbor and the Chesapeake Bay. The evidence in this case includes photographs of silt-laden waters emanating from the now-filled wetlands on the Newdunn Property and merging with the clear waters of the west arm of Stony Run. See *id.* at 4a, 19a, 30a-32a.

In 1997, consultants hired by petitioner Newdunn Associates informed petitioner that most of the Newdunn Property consisted of wetlands. In December 1999, the Corps confirmed that determination and informed petitioner that, in the view of the Corps, the wetlands in question were part of "the waters of the United States" and were therefore subject to federal regulatory authority under the CWA. In May 2001, petitioner informed the Corps that, in light of this Court's intervening decision in *SWANCC*, petitioner believed that the Corps lacked regulatory authority over the wetlands at issue. The Corps re-evaluated its prior jurisdictional determination and reaffirmed its view that the Newdunn Property contained wetlands that are part of "the waters of the United States." Pet. App. 4a, 27a-28a.

Petitioners declined to pursue an administrative appeal of the Corps' jurisdictional determination and instead began to fill the wetlands the following month. Petitioners continued their filling activities despite the Corps' issuance of two cease-and-desist notices. On July 6, 2001, the government filed this suit, alleging that petitioners were in violation of Sections 301 and 404 of the Clean Water Act, 33 U.S.C. 1311, 1344, by discharging dredged or fill material into "the waters of the United States" without a permit. The government sought injunctive and remedial relief, as well as civil penalties. See Pet. App. 4a-5a, 21a-22a.

4. The district court granted judgment for the petitioners. Pet. App. 20a-56a. The court concluded that petitioners' unpermitted discharges of fill material into wetlands were not prohibited by the CWA because the wetlands on the Newdunn Property were not part of "the waters of the United States." The district court acknowledged the existence of a surface water connection from the wetlands on the Newdunn Property to traditional navigable waters in Stony Run, and ultimately to the Chesapeake Bay. See *id.* at 30a-31a. Relying on *SWANCC*, however, the court held that, because the wetlands were not contiguous with or adjacent to traditional navigable waters, the Corps' assertion of regulatory authority over petitioners' discharges exceeded the powers granted to the agency by Congress. See *id.* at 41a-44a, 46a-50a, 54a.

5. The court of appeals reversed the judgment of the district court and remanded for further proceedings. Pet. App. 1a-19a.

a. The court of appeals stated that, under *SWANCC*, the Corps' exercise of regulatory jurisdiction over "isolated ponds that had no hydrologic connection whatsoever to [traditional] navigable waters could

not stand." Pet. App. 15a. The court held, however, that the surface water connection between the wetlands on the Newdunn Property and traditional navigable waters provided a sufficient basis for the Corps' assertion of authority. *Id.* at 16a-17a. The court relied on its recent decision in *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), petition for cert. pending, No. 03-701 (filed Nov. 10, 2003), which held that the Corps' regulation of "nonnavigable tributaries and their adjacent wetlands * * * is well within Congress's traditional power over navigable waters." Pet. App. 17a (quoting *Deaton*, 332 F.3d at 707). The court of appeals explained that "the Corps' unremarkable interpretation of the term 'waters of the United States' as including wetlands adjacent to tributaries of navigable waters is permissible under the CWA because pollutants added to any of these tributaries will inevitably find their way to the very waters that Congress has sought to protect." *Ibid.*

b. The court of appeals also relied on *Deaton* to uphold the Corps' treatment of the I-64 ditch as a "tributary." Pet. App. 17a-18a. The court explained that it had previously deferred in *Deaton* to the Corps' decision to define "tributary" to include the "entire tributary system," including man-made roadside ditches. *Id.* at 17a. The court observed that the core justification for federal protection under the CWA of nonnavigable tributaries and adjacent wetlands—*i.e.*, that discharges into such waters will "have a substantial effect on water quality in navigable waters"—applies with equal force to man-made as to natural waterways. *Ibid.* The court of appeals credited the Corps' explanation that the "discharge of a pollutant into a waterway generally has the same effect downstream whether the waterway is natural or manmade," and that "the CWA's chief goal

would be subverted" if the court concluded "that the I-64 ditch is not a 'tributary' solely because it is man-made." *Id.* at 17a-18a (citation omitted).

c. Applying its legal analysis to the facts of this case, the court of appeals examined the surface water connection between the wetlands on the Newdunn Property and traditional navigable waters. Pet. App. 18a-19a. The court found it "undisputed that water flows intermittently from wetlands on the Newdunn Property through a series of natural and manmade waterways, crossing under I-64, draining into the west arm of Stony Run, and eventually finding its way 2.4 miles later to traditional navigable waters." *Id.* at 18a. The court concluded that "[b]ecause there exists a sufficient nexus between the Newdunn Wetlands and navigable waters-in-fact, the Corps' jurisdiction in this case is amply supported by the Act and the Corps' regulations under the Act." *Id.* at 19a. The court of appeals reversed the judgment of the district court and remanded the Corps' enforcement action to the district court for further proceedings. *Ibid.*

ARGUMENT

The interlocutory decision of the court of appeals is correct and does not squarely conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. As a threshold matter, this Court's review is unwarranted because of the interlocutory posture of the case. The court of appeals reversed the district court's determination that the wetlands on the Newdunn Property lay outside the Corps' regulatory authority under the CWA. The court of appeals did not finally resolve the Corps' enforcement action, however; rather, it remanded for further proceedings in the dis-

trict court. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," even where the court of appeals has resolved the merits of the case and only the "determination of an appropriate remedy" remains. *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court").

2. The court of appeals' judgment and legal analysis are correct.

a. Under established constitutional principles, Congress's "power over [traditional] navigable waters also carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters." *Deaton*, 332 F.3d at 707. The Corps' delineation of its own regulatory authority under the CWA has long been premised on the fact that, because "[w]ater moves in hydrologic cycles," pollution of waters that do not themselves meet traditional tests of navigability "will affect the water quality of the other waters within that aquatic system." *Riverside Bayview*, 474 U.S. at 134 (quoting 42 Fed. Reg. 37,128 (1977)); see *Deaton*, 332 F.3d at 707 ("[T]he principle that Congress has the authority to regulate discharges into nonnavigable tributaries in order to protect navigable waters has long been applied to the Clean Water Act."); *id.* at 712 (accepting, as reasonable and supported by the evidence, the Corps' contention that "discharges into nonnavigable tributaries and adjacent wetlands have a

substantial effect on water quality in [traditional] navigable waters"). Exclusion of nonnavigable tributaries and their adjacent wetlands from the coverage of the CWA would subvert Congress's efforts to ensure that the quality of traditional navigable waters is adequately protected. To prevent that result, the Corps and EPA have reasonably defined the term "waters of the United States" to include wetlands adjacent to tributaries that flow into traditional navigable waters.

b. This Court's decision in *SWANCC* does not cast doubt on the propriety of that regulatory determination. To the contrary, the Court in *SWANCC* quoted with apparent approval its prior holding that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" 531 U.S. at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). And while the Court in *SWANCC* rejected the Corps' construction of the term "waters of the United States" as encompassing isolated ponds used as habitat for migratory birds, *id.* at 171-172, its reasoning does not cast doubt on the propriety of the Corps' assertion of regulatory authority here.

The Court in *SWANCC* explained that, if the use of isolated ponds by migratory birds were found to be a sufficient basis for federal regulatory jurisdiction under the CWA, the word "navigable" in the statute would be rendered superfluous. 531 U.S. at 172. While recognizing that the term "navigable waters" as used in the CWA includes "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *id.* at 171 (quoting *Riverside Bayview*, 474 U.S. at 133), the Court stressed that the word "navigable" must be given some substantive content,

see *id.* at 172 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."). The Court concluded that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

Unlike the Corps' prior effort to regulate "isolated" waters based on their use as habitat for migratory birds, the regulation of petitioners' filling activities rests squarely on the agency's longstanding authority to protect traditional navigable waters. "Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." *Deaton*, 332 F.3d at 707. Construing the CWA term "waters of the United States" to encompass wetlands adjacent to tributaries that flow into traditional navigable waters thus gives independent content to the term "navigable," and accords with the established understanding of congressional power to regulate and protect traditional navigable waters. See *id.* at 707, 709-710; *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 525-526 (1941) (Congress may authorize flood control projects on intrastate nonnavigable tributaries in order to prevent flooding in traditional navigable rivers); see also *United States* v. *Rapanos*, 339 F.3d 447, 450-453 (6th Cir. 2003) (upholding CWA jurisdiction over wetlands that flow through a man-made ditch and nonnavigable natural tributary to reach traditional navigable waters 11 to 20 miles downstream), petition for cert. pending, No. 03-929 (filed Dec. 22, 2003); *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 533-534 (9th Cir. 2001)

(upholding CWA jurisdiction over nonnavigable irrigation canals that receive water from, and divert water to, natural streams and lakes).

c. Concededly, not every discharge of fill material into "the waters of the United States" (as the Corps and EPA have defined the term) can be expected to have deleterious effects on the quality of traditional navigable waters. That fact, however, does not cast doubt on the propriety of the agencies' adjacent wetlands regulations. As the Court in *Riverside Bayview* explained:

> [I]t may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." * * * That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

474 U.S. at 135 n.9. Thus, inclusion of petitioners' wetlands within the regulatory definition of "waters of the United States" does not mean that filling of such wetlands is necessarily prohibited. It simply means that the Corps will analyze (and attempt to mitigate) the likely impacts of proposed discharges on federal interests before deciding whether a particular project may go forward. By filling the wetlands on the Newdunn Property without seeking a Section 404 permit,

petitioners prevented the Corps from making that determination.

3. Contrary to petitioners' contention (Pet. 7-10), the Fourth Circuit's decision in this case does not squarely conflict with any decision of another court of appeals.

a. Petitioners' reliance (Pet. 7-10) on *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is misplaced. *Rice* addressed the question whether the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, imposed liability on parties who discharged oil onto dry ground, where that oil was alleged to have migrated into various types of waters. Like the Clean Water Act, the OPA regulates discharges into "navigable waters," defined as "the waters of the United States." 33 U.S.C. 2701(21); see 33 U.S.C. 2702(a). The term is generally understood to have the same meaning under both statutes. See *Rice*, 250 F.3d at 267-268.

The court in *Rice* rejected each of three suggested bases for the imposition of OPA liability. First, the Fifth Circuit addressed the question whether the OPA regulated "discharges of oil that contaminate the groundwater," and it held that "subsurface waters are not 'waters of the United States' under the OPA." 250 F.3d at 270. Second, the court in *Rice* addressed the plaintiffs' contention that "surface waters on the [property] are directly threatened by [the defendant's] discharges into the groundwater." *Ibid.* The court found that all discharges were onto dry land and that there was no evidence of any discharge directly into surface water. *Ibid.* The court further concluded that, even if the discharges could be shown to have seeped into the surface waters on the ranch, the record was insufficient to support a determination that those waters were part of "the waters of the United States." The court explained that the record in the case contained "no

detailed information about how often the creek runs, about how much water flows through it when it runs, *or about whether the creek ever flows directly (above ground) into the Canadian River.*" *Id.* at 270-271 (emphasis added). Absent proof of a surface connection between the creek in question and any traditional navigable water, the court was unable to conclude that the creek was "sufficiently linked to an open body of navigable water as to qualify for protection under the OPA." *Id.* at 271. Third, the court in *Rice* addressed the question whether "discharges into groundwater that migrate into protected surface waters" are covered by the OPA. *Ibid.* The court held that the OPA does not apply to "discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272.

Thus, the Fifth Circuit's decision in *Rice* was premised on the absence of any demonstrated surface water connection between the allegedly contaminated seasonal creek and any traditional navigable water. The decision therefore does not conflict with the Fourth Circuit's ruling in the instant case, which upheld the exercise of federal regulatory authority under the CWA based on the presence of such a connection. Petitioners rely in part (see Pet. 8) on the *Rice* court's statement that "it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." 250 F.3d at 269. Petitioners appear (see Pet. 8) to construe that language to mean that a surface water connection to traditional navigable waters provides an insufficient basis for federal regulatory authority under the OPA and CWA if that connection is too "indirect" or "attenuated." But since

the Fifth Circuit in *Rice* found that the plaintiffs had failed to prove the existence of *any* surface water connection between the water bodies in question and traditional navigable waters, the court's ambiguous dictum is insufficient to establish a square circuit conflict warranting this Court's review.

b. For similar reasons, the Fifth Circuit's recent decision in *In re Needham*, No. 02-30217, 2003 WL 22953383 (Dec. 16, 2003), issued after the filing of the certiorari petition in the instant case, does not squarely conflict with the Fourth Circuit's decision here. *Needham*, like *Rice*, involved a suit under the OPA. See *id.* at *1. The oil at issue in *Needham* "was originally discharged into [a] drainage ditch at Thibodeaux Well," and from there "spilled into Bayou Cutoff, and then into Bayou Folse. Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico." *Ibid.* The Fifth Circuit held that the defendants' conduct was covered by the OPA. *Id.* at *4-*5. The court stated that "the proper inquiry is whether Bayou Folse, the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water." *Id.* at *4. The Fifth Circuit found that "Bayou Folse is adjacent to an open body of navigable water, namely the Company Canal," *ibid.*; and it concluded on that basis that "the Thibodeaux Well oil spill implicated navigable waters and triggered federal regulatory jurisdiction pursuant to the OPA," *id.* at *5.

In the course of its analysis, the Fifth Circuit appeared to disapprove the results reached by the Fourth and Sixth Circuits in *Deaton* and *Rapanos*, and it stated that "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable

nor truly adjacent to navigable waters." *Needham*, 2003 WL 22953383, at *3. That statement was dictum, however, in light of the *Needham* court's determination that the oil spill actually involved in that case was covered by the OPA. And while the *Needham* court stated that "both the regulatory and plain meaning of 'adjacent' mandate a significant measure of proximity," *id.* at *5 n.12, and that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway," *id.* at *5, the court did not offer a precise rule for determining when a nonnavigable tributary is "adjacent" to a traditional navigable water. Thus, even assuming that the Fifth Circuit decides to follow the *Needham* dictum in a future case where the issue is actually presented, it is unclear to what extent the approaches taken by the Fourth and Fifth Circuits would lead to different results in concrete factual settings.

It should also be noted that the Fifth Circuit in *Needham* sustained the application of the OPA to the defendants' conduct based on the ultimate downstream presence of oil in Bayou Folse. See 2003 WL 22953383, at *4-*5; p. 15, *supra*. The court did not examine whether the drainage ditch (the site of the original discharge) or Bayou Cutoff (the body of water into which the ditch directly flowed) was itself "adjacent" (as the court understood that term) to any traditional navigable water. Rather, the court framed the relevant question as "whether Bayou Folse, the site of the farthest traverse of the spill," satisfied the court's adjacency requirement. *Needham*, 2003 WL 22953383, at *4.

Thus, in cases where it can be shown that an oil discharge has actual downstream effects, the Fifth Circuit (correctly) regards the OPA as applicable even if the

first water body into which oil is discharged does not meet the court's standard for being "actually navigable or * * * adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. The Fifth Circuit may also decide, in an appropriate future case, that an upstream discharge is covered by the OPA where the downstream effects of an oil discharge are potential rather than actual (*e.g.*, where remedial measures prevent discharged oil from reaching waters that the Fifth Circuit regards as "adjacent" to traditional navigable waters). The Fifth Circuit's willingness to consider the downstream effects of an oil discharge in determining the applicability of the OPA further diminishes the current practical significance of that court's dictum expressing apparent disagreement with the regulatory approach adopted by the government and sustained by the Fourth Circuit in this case.

4. There is no merit to petitioners' contention (Pet. 13-14) that the I-64 ditch cannot be a "tributary" because the Clean Water Act includes "ditch" in the definition of "point source." See 33 U.S.C. 1362(14). The fact that some ditches are "point sources" provides no support for a categorical rule that a surface water connection to traditional navigable waters that includes a man-made ditch should be ignored in determining whether the site of a pollutant discharge is part of "the waters of the United States." Ditches like the one involved in this case, which carries water between the wetlands on the Newdunn Property and the west arm of Stony Run, fall comfortably within standard dictionary definitions of the regulatory term "tributary." See *Deaton*, 332 F.3d at 710. And, as the court of appeals recognized (Pet. App. 18a), "the CWA's chief goal would be subverted" if the ditch at issue here were found to break the surface connection between the

wetlands and traditional navigable waters, since "[t]he discharge of a pollutant into a waterway generally has the same effect downstream whether the waterway is natural or manmade." *Id.* at 17a-18a. The CWA definition of "point source" also includes the more general term "channel," see 33 U.S.C. 1362(14); but there is no basis for concluding that water within any manmade "channel" is categorically excluded from "the waters of the United States," and such a rule of construction would plainly disserve the purposes of the Act.

5. Petitioners contend (Pet. 15-18) that the court of appeals' decision is inconsistent in various respects with the Corps' own regulations and policy guidance. Those factbound claims lack merit and do not warrant this Court's review.

a. Petitioners contend (Pet. 15) that the court of appeals erred in upholding the Corps' exercise of regulatory jurisdiction over the wetlands on the Newdunn Property without determining that the I-64 ditch has an "ordinary high water mark" (OHWM).[2] Petitioners did not make that argument in the court of appeals, and further review is unwarranted for that reason alone. In addition, the regulatory provision on which petitioners rely pertains to *lateral* (*i.e.*, shoreward) jurisdiction. See 33 C.F.R. 328.4(c); 51 Fed. Reg. 41,217 (1986). Although Corps guidance recognizes the utility of the OHWM for determining upstream jurisdiction as well, see 51 Fed. Reg. at 41,217, neither the regulation nor the guidance establishes the presence of an OHWM as

---

[2] The term "ordinary high water mark" is defined as a line on the shore established by fluctuations of water as evidenced by various physical characteristics set forth at 33 C.F.R. 328.3(e). The existence of an OHWM generally indicates that water moves through the watercourse with some regularity.

the sole criterion for determining the upstream limits of a tributary. In any event, the Corps offered uncontradicted expert testimony that the I-64 ditch had an OHWM along its entire length, and petitioners' own expert acknowledged that the uppermost portion of the ditch had an OHWM. See Tr. 168-169, 236-237, 249, 393-394.

b. Petitioners contend (Pet. 15-16) that the Corps' regulations have consistently distinguished man-made ditches from natural tributaries. The regulatory guidance on which they rely, however, states only that "[n]on-tidal drainage and irrigation ditches *excavated on dry land*" are generally not considered to be part of "the waters of the United States." 51 Fed. Reg. at 41,217 (emphasis added); see 65 Fed. Reg. 12,823-12,824 (2000) (providing further clarification of when the Corps will treat water in drainage ditches as part of "the waters of the United States" for purposes of the CWA). Even with respect to that category of ditches, the Corps has expressly "reserve[d] the right on a case-by-case basis to determine that a particular waterbody * * * is a water of the United States." 51 Fed. Reg. at 41,217. In any event, the proper treatment of "ditches excavated on dry land" (*ibid.*) is not at issue in this case, since the I-64 ditch was excavated in part through the wetlands complex in which the wetlands on the Newdunn Property were historically contained, and it reroutes a pre-existing natural surface hydrological connection between the wetlands and traditional navigable waters. Because a man-made ditch is as capable as a natural waterway of carrying pollutants from an upstream body of water to traditional navigable waters downstream, the Corps and EPA have reasonably declined for these purposes to distinguish between the two. See Pet. App. 17a-18a; pp. 17-18, *supra*.

c. Petitioners contend (Pet. 17-18) that the Corps has historically treated wetlands (like those at issue here) that are above a tributary system's "headwaters" in the same manner as the "isolated" waters that the Court in *SWANCC* held were outside the coverage of the CWA. It is true that the Corps has sometimes issued "nationwide permits" in lieu of individual permits for activities that affected a defined, limited amount of acreage (most recently three acres) of either (1) isolated waters (prior to *SWANCC*) or (2) wetlands and other waters in a tributary system that are located above that system's headwaters.[3] See 65 Fed. Reg. 12,818-12,819 (2000). But the Corps' previous decision to treat the two categories of waters similarly in that particular respect does not logically suggest that CWA regulation of the two categories of waters must stand or fall together. Petitioners cite no case that has construed *SWANCC* (which involved only isolated waters) to foreclose the exercise of federal regulatory authority over wetlands above the headwaters of a tributary system where such wetlands are hydrologically connected to the tributary.

6. Petitioners argue (Pet. 19-23) that this Court should grant certiorari in order to rectify purported inconsistencies between various Corps administrative determinations concerning the scope of the agency's regulatory authority under the CWA. The stray language quoted by petitioners, culled from a handful of administrative decisions involving complex and varying factual settings, wholly fails to suggest a pattern of arbitrary conduct, much less to establish that the

---

[3] For purposes of the nationwide permits, "headwaters" are defined generally as watercourses with an annual average flow less than five cubic feet per second. 33 C.F.R. 330.2(d).

Corps' jurisdictional determination in the instant case was arbitrary or contrary to law. Once the Corps has issued its final decision on a permit application, its administrative determinations are subject to judicial review under the Administrative Procedure Act, and such review is more than adequate to correct any demonstrated instance of arbitrary decisionmaking.

7. Petitioners contend that the CWA "does not authorize the Corps to exercise general land use regulation." Pet. 23; see Pet. 23-24. That statement is true enough; but the Corps does possess longstanding authority to protect the quality of traditional navigable waters by regulating upstream pollutant discharges. See pp. 11-12, *supra*. As cases like *Riverside Bayview* make clear, the Corps' exercise of that authority may as a practical matter affect activities (*e.g.*, residential housing development, see *Riverside Bayview*, 474 U.S. at 124) that are also subject to extensive state regulation. See *Deaton*, 332 F.3d at 707 ("The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers."). So long as the Corps' assertion of regulatory authority in this case was an otherwise permissible use of the federal power to protect traditional navigable waters, the requirement that petitioners seek a federal permit for their fill activities does not impermissibly encroach on state and local land-use planning. See *id.* at 707-708.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
GREER S. GOLDMAN
KATHERINE J. BARTON
Attorneys

JANUARY 2004

Supreme Court, U.S.
FILED
FEB 6 - 2004
OFFICE OF THE CLERK

No. 03-637

In the Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

TIMOTHY S. BISHOP
RUSSELL R. EGGERT
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

DOUGLAS E. KAHLE
Counsel of Record
MARK R. BAUMGARTNER
Pender & Coward, P.C.
222 Central Park Ave.
Virginia Beach, VA 23462
(757) 490-3000

Counsel for Petitioners

TABLE OF AUTHORITIES

Page(s)

CASES

Braxton v. United States,
500 U.S. 344 (1991) 9

Forsyth v. Hammond,
166 U.S. 506 (1897) 9

In re Needham, No. 02-30217
2003 U.S. App. LEXIS 25318
(5th Cir. December 16, 2003) 1, 3

Newton v. Rumery,
480 U.S. 386 (1987) 9

Rice v. Harken,
250 F.3d 264 (5th Cir. 2001) 2

School Bd. of Nassau County v. Arline,
480 U.S. 273 (1987) 9

United States v. Deaton,
332 F.3d 698 (4th Cir. 2003),
cert. petition pending, No. 03-701
(filed Nov. 10, 2003) 1

United States v. *Rapanos*,
339 F.3d 447 (6th Cir. 2003),
cert. petition pending, No. 03-929
(filed Dec. 30, 2003) 3

TABLE OF AUTHORITIES – continued

Page(s)

FEDERAL STATUTES

33 U.S.C. § 1342 ..... 3, 4

33 U.S.C. § 1344 ..... 3, 7

33 U.S.C. § 1367 3

OTHER AUTHORITIES

Amicus Curiae Brief of the
Honorable John J. Duncan, Jr.,
Deaton, cert. petition pending, No. 03-701 4

REPLY BRIEF FOR PETITIONERS

The government does not dispute that this case presents an issue of national importance. The Fourth Circuit's interpretation of the Clean Water Act to grant the federal government authority over "any branch of a tributary system that eventually flows into a navigable body of water" (Pet. App. 16a), has such far-reaching impact that no less than fifteen *amicus curiae* briefs have been filed urging this Court to review the Fourth Circuit's stance.[1] *Amicus* briefs have been filed by individual citizens, a member of congress, state agencies, local development authorities, drainage associations and organizations representing such diverse interests as oil producers, developers, farmers, miners and independent businesses. As we demonstrated in the petition and the government has not refuted, the Fourth Circuit's decision should be reviewed by this Court because it (i) has been squarely rejected by another Circuit Court of Appeals, (ii) is contrary to the plain language and legislative history of the CWA and this Court's teachings, and (iii) raises serious constitutional questions.

As the government concedes (at 15), the Fifth Circuit has soundly rejected the Fourth Circuit's interpretation. In the Fifth Circuit, "the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like." *In re Needham*, 2003 U.S. App. LEXIS 25318 at *10 (5th Cir. December 16, 2003). The Fifth Circuit correctly recognizes that this Court in *SWANCC* determined that the

[1] Five *amicus* briefs have been filed in this case and another ten have been filed in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. petition pending, No. 03-701 (filed Nov. 10, 2003). The *Deaton* case, which was also decided by the Fourth Circuit, presents a similar question regarding the scope of the Corps authority pursuant to the CWA.

legislative intent of the Clean Water Act was to regulate navigable waters and those waters that have a "significant nexus" and are "inseparably bound up with" navigable waters--which do not include "roadside ditches" like those at issue here.

By contrast, the Fourth Circuit allows the Corps to exercise regulatory authority based upon the mere possibility of any connection with navigable waters, regardless of how fleeting, tenuous or hypothetical the connection may be. In this case, the district court, after making detailed factual findings, concluded that the Corps had "not carried its burden of factually proving a sufficient connection between the wetlands on the Property and navigable waters or waters of the United States." Pet. App. 45a. The district court detailed the path water would have to take from the Property before reaching navigable water, and noted that the Corps presented "no evidence of the frequency or volume of the surface water runoff." Pet. App. 29a. The Fourth Circuit accepted all of the district court's factual findings. Therefore, the Fourth Circuit's holding allows the Corps to assert CWA regulatory jurisdiction without *any* proven actual nexus with navigable water.

The Fifth Circuit's decisions in Rice and Needham directly conflict with the Fourth and Sixth Circuit Courts of Appeals. The government concedes that the Fifth Circuit's interpretation of the OPA applies equally to the CWA. U.S. Br. 14. In *Rice,* the Fifth Circuit held that the government failed to establish jurisdiction because there was "no detailed information about how often the creek runs or about how much water flows through it." *Rice v. Harken*, 250 F.3d 264, 270-271 (5th Cir. 2001). In this case, the Fourth Circuit upheld jurisdiction without overturning the district court's finding that there "is no evidence of the frequency or volume of the surface water runoff." Pet. App. 29a. Similarly, the Sixth Circuit recently reinstated a criminal conviction for a violation of the CWA based upon

the mere *possibility* that water *could* flow from the defendants' property to navigable water. *United States* v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003), cert. petition pending, No. 03-929 (filed Dec. 30, 2003). The Circuits are undeniably split: the Fifth Circuit, *at a minimum*, requires evidence to evaluate the "sufficiency" of a connection; the Fourth and Sixth Circuits do not.

The government erroneously claims that the Fifth Circuit's decision in *Needham* was based on the "downstream effects" of an oil spill. U.S. Br. 16. In fact, the Fifth Circuit relied on the parties' stipulation that "oil was discharged from the Thibodeaux facility into Bayou Cutoff and Bayou Folse." *Needham*, 2003 U.S. App. LEXIS at *12. It was undisputed that Bayou Folse was "adjacent to an open body of navigable water, namely the Company Canal." *Id.* at *13. Thus, the Fifth Circuit required the government to prove a discharge of oil into "waters of the United States," which the Fifth Circuit held only included "navigable-in-fact waters" or "non-navigable waters (or wetlands) that are truly adjacent to an open body of navigable water." *Id.* at 17. In this case the *only* discharge alleged by the government was on the Newdunn Property. Pet. App. 32a. The government did not allege, nor prove that *any* pollutant was discharged into (or adjacent to) *any* traditional navigable water.

Limiting the Corps' § 404 jurisdiction, as Congress intended, would not subvert the goals of the Clean Water Act. Section 404 authorizes the Corps to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites. 33 U.S.C. § 1344. Other sections of the Act regulate discharges from point sources, such as roadside ditches, at the point where they discharge into navigable waters. 33 U.S.C. § 1342 (CWA § 402) (prohibiting discharges of pollutants from point sources) and § 1367 (defining ditches as point sources). Congress made the decision to address the effects of pollution flowing through roadside ditches by regulating them at the point

where the ditches flow into navigable water. CWA § 402; see also *Amicus Curiae* Brief of the Honorable John J. Duncan, Jr., *Deaton*, No. 03-701. As Representative Duncan explains, the Clean Water Act expressly allows states and municipalities to determine the best way to control the pollution that enters into the system of roadside ditches, culverts and drains that make up a municipal separate storm sewer system ("MS4"). Federal concerns are only implicated where the point sources discharge into navigable waters. Representative Duncan expresses concern that the Fourth Circuit's decision in *Deaton* "could" cause MS4's to be considered "waters of the United States", a result which would "completely upset" the legislative intent of the CWA. *Id.* at 7 n.7.

Representative Duncan's fears have been realized in this case. The ditches that the Fourth Circuit deemed "waters of the U.S." are, in fact, part of an MS4 operated by the City of Newport News and the Virginia Department of Transportation. Stip. Trial Ex. 7. The Fourth Circuit has completely upset the local/federal balance of the CWA and ruled as a matter of law that *all* MS4's that discharge into navigable waters are themselves 'waters of the United States.' If the Fourth Circuit's decision is not reversed, MS4's would no longer be regulated at the point of discharge into navigable waters. Instead, all water in municipal sewer systems would be required to meet the water quality standards set forth in the CWA. The legislative intent of § 402 would be defeated.

If this Court were to reverse the Fourth Circuit and hold that non-navigable ditches are not waters of the United States, the environmental protection provided by § 402 would be unaffected. Pursuant to § 402, Municipalities (and other MS4 operators) are charged with developing their own policies for discharges *into* MS4's provided discharges *from* MS4's meet certain quality standards. Congress intended to preserve and protect the rights of states and localities to make

land use decisions and balance competing local interests. Congress, therefore, chose to regulate only the point of discharge into navigable waters. Federal policies and goals of pollution prevention are completely protected if each section of the CWA is allowed to operate as Congress intended. Conversely, adopting the governments' theory of CWA jurisdiction would eviscerate state and local governments' power over land use decisions.

This Court's consideration is necessary because of the hopeless confusion exhibited by the government. The varying arguments made in this case alone demonstrate that the regulating agencies have no clear idea as to the proper scope of the Clean Water Act. The government's theory has changed with each successive agency assigned to this case. The Corps, Department of Justice trial counsel, Department of Justice appellate counsel and the Solicitor General have each asserted a new theory of jurisdiction.

Prior to trial in this case, the Corps asserted jurisdiction solely on the basis that the Newdunn Property was "adjacent" to Stony Run, which it argued was a tributary to the Warwick River, a navigable water of the U.S. Stip. Trial Ex. 4. Stony Run is 2.4 miles from the Newdunn Property. Pet. App. 30a–31a. At trial, "the Corps' [through DOJ trial counsel] claim of jurisdiction [was] based *solely* upon the alleged surface water or hydrological connection of the Property to the navigable portion of Stony Run." Pet. App. 29a–30a (emphasis added). On appeal to the Fourth Circuit, DOJ appellate counsel for the first time argued that the ditches were "tributaries" because they exhibited an Ordinary High Water Mark. See Opening Brief of the United States 27. Indeed the government included the OHWM in its question presented to the Fourth Circuit. DOJ appellate counsel argued extensively that the existence of an OHWM was the *sine qua non* of CWA jurisdiction. See *id.* at 2, 13, 15, 27, 47-48, 52-53, 56; and Reply Brief of the United States at 23-26. In response, *Newdunn* extensively controverted the

Corps' fallacious arguments regarding ordinary high water marks. *See Newdunn*'s Brief at 4, 6-7, 48-52.[2] Incredibly, the government now contends that "Petitioners did not make [an OHWM] argument in the court of appeals, and further review is unwarranted for that reason alone." U.S. Br. 18. The confusion surrounding CWA jurisdiction has reached the point that the government has lost track of its own arguments. Further review is *warranted* for that reason alone.

In response to *Newdunn*'s Petition, the government (now represented by the Solicitor General) has abandoned its ordinary high water mark argument. Having apparently exhausted its theories, the government returns to its "surface water connection" theory.[3] However, as noted by the district court, the term "surface water connection" is not contained in the Act or the regulations. Furthermore, even the government acknowledges that not *every* surface water connection is sufficient and argues instead that a decision must be made on a case-by-case basis.

Assuming, without for a moment conceding, that the Clean Water Act permissibly grants the Corps the discretionary authority to decide on a "case-by-case basis" whether federal jurisdiction is appropriate, U.S. Br. 19, the Corps must, at a minimum, be able to justify its decision in a court of law. The government concedes that "judicial

---

[2] The concept of an ordinary high water mark also played a central role during oral argument. See Fourth Circuit Oral Argument Transcript at 5-7, 10, 22-24, 38-39.

[3] Further distorting the record, the government now pretends that the question presented to this Court is the status of ditches that re-route "pre-existing natural surface hydrologic connections." U.S. Br. I. *That* question was not presented to the Fourth Circuit and the trial court made *no* factual finding that such a connection ever existed.

review" is appropriate but seemingly argues that such "judicial review" is *only* appropriate under the APA. *Id.* at 21. There is no support for such a suggestion.

In addition to justifying its administrative decisions, the Corps *must* be able to prove jurisdiction when it files an action to enforce the CWA. The district court found that the Corps failed to prove jurisdiction in this case. The district court's factual findings are extensive and must be afforded great weight. None of the Judge's factual findings were overturned or even questioned by the Court of Appeals. Therefore, if jurisdiction may be determined on a case-by-case basis, the district court's factual determination in this case, that "the Corps has not carried its burden," Pet. App. 45a, must stand.

The mere assertion of CWA jurisdiction has direct and concrete consequences on a landowner. The government's protestations (at 12) that there is no need to be concerned about the scope of its jurisdiction because after exercising jurisdiction it may choose to issue a permit ignore both the limits Congress imposed on federal power in the Act and the huge burdens on landowners once caught in the grip of Section 404. Section 404 of the CWA only requires citizens to obtain permits to discharge dredged or fill material into navigable waters. 33 U.S.C. § 1344. The Corps has no authority to compel all landowners to submit to the Corps' administrative process in order to evaluate whether jurisdiction exists.

The administrative process is extremely long (for example, the agency in *SWANCC* pursued the process for 15 years) and extremely burdensome (the administrative record in *SWANCC* consisted of a staggering 47,000 pages that cost several million dollars to compile). See also Rapanos *Amicus* Br. 10. If the Corps ultimately grants a permit, mitigation for impacts to wetlands is mandatory and can cost a landowner up to $85,000 per acre of wetland impacts.

Landowners are entitled to clear guidance to determine when they are subject to these onerous governmental restrictions.

Not only is clear guidance unavailable, but the Corps ignores the guidance that does exist. For example, in January 2003, the EPA and Corps issued guidance stating that, in light of *SWANCC*, the agencies "are now precluded from asserting CWA jurisdiction" over such waters as "pocosins." EPA & Corps, *Guidance for Asserting Federal Jurisdiction Over Isolated Wetlands in Response to U.S. Supreme Court Decision in SWANCC Case,* 68 Fed. Reg. 1991, 1995 (Jan. 15, 2003). Yet, the government appears in this Court asserting its jurisdiction over what its own expert stated at trial was "very typical of what we call a Poquoson [sic] a swamp on a hill." Tr. 297. The confusion that now reigns is not the result of "stray language" by administrators (U.S. Br. 20) but of uncertainty in all quarters as to the most basic question of the scope of Section 404 jurisdiction. Landowners have no hope of discerning an intelligible principle guiding the Corps' jurisdiction from the existing muddle of conflicting caselaw and agency pronouncements.

This matter is ripe for review. The Fourth Circuit's decision concludes that Newdunn's property is subject to the CWA. All other elements of the alleged violation have been established and affirmed by the Fourth Circuit. The only matter left for the district court on remand is the determination of an appropriate fine and formal entry of judgment. Unlike the cases cited by the government, U.S. Br. 9, this case has not been remanded to formulate plans or make findings that could eliminate any need for review. Here, the case is complete, and the ruling below final, as to the critical legal issues presented in the petition. The mere determination of the government's remedy has no bearing on those issues and provides no reason to delay addressing a circuit split on an important question affecting, as *amicus* briefs demonstrate, many different interests across the Nation. See *Braxton v. United States*, 500 U.S. 344 (1991)

(granting certiorari after circuit court's remand for sentencing); *Newton v. Rumery*, 480 U.S. 386 (1987) (granting certiorari after circuit court's remand); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 277 (1987) (same).

Certiorari will be granted when "the importance of the question involved, the necessity of avoiding conflict between [the] Courts of Appeal ... or some matter affecting the interests of this nation in its internal [ ] relations, demands such exercise." *Forsyth v. Hammond*, 166 U.S. 506, 515 (1897). We have demonstrated the national importance of the issues and the depth of the conflicts presented in this case. The Fourth Circuit Court of Appeal's ruling is erroneous and should be reviewed by this Court at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

TIMOTHY S. BISHOP
RUSSELL R. EGGERT
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

DOUGLAS E. KAHLE
Counsel of Record
MARK R. BAUMGARTNER
Pender & Coward, P.C.
222 Central Park Ave.
Virginia Beach, VA 23462
(757) 490-3000

FEBRUARY 2003

Supreme Court, U.S.
FILED
MAR 8 - 2004
OFFICE OF THE CLERK

(9)

No. 03-637

In the Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

TIMOTHY S. BISHOP
RUSSELL R. EGGERT
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

DOUGLAS E. KAHLE
Counsel of Record
MARK R. BAUMGARTNER
Pender & Coward, P.C.
222 Central Park Ave.
Virginia Beach, VA 23462
(757) 490-3000

Counsel for Petitioners

TABLE OF AUTHORITIES

Page(s)

EPA Press Release: *EPA and Army Corps Issue Wetlands Decision*, (December 16, 2003) 2

Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (February 27, 2004) 1, 2

SUPPLEMENTAL BRIEF FOR PETITIONERS

In our Petition, we provided numerous examples of the Corps' arbitrary jurisdictional decisions and demonstrated that without this Court's guidance "landowners' property rights will continue to be determined on an arbitrary, *ad hoc* basis, with inconsistent results from different Corps divisions and courts throughout the country." Petition 19. Counsel for the U.S. Corps of Engineers dismissed the "stray language quoted by petitioners" and argued that the examples "wholly fail[] to suggest a pattern of arbitrary conduct." U.S. Br. 20.

In a report released since we filed our Reply, however, the United States General Accounting Office confirmed that the Corps' districts differ significantly in how they interpret and apply the federal regulations when determining which waters and wetlands are subject to federal jurisdiction. Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (February 27, 2004) ("GAO Report").

The GAO Report is based upon an "in-depth examination of [the] jurisdictional determination practices" in 16 of the Corps' 38 district offices. *Id.* at 31. During its investigation, the GAO discovered "several differences in the practices Corps districts use to make jurisdictional determinations." *Id.* at 17. An official at the Corps' Portland District even admitted "that if he asked three different district staff to make a jurisdictional determination, he would probably get three different assessments." *Id.* at 22. As described by the GAO, such inconsistency is the norm.

For instance, although the Rock Island District was instructed by Corps headquarters not to use man-made "drain tiles" to establish jurisdictional connections, *Id.* at 25, the

Chicago District routinely uses drain tiles to establish jurisdiction. *Id.* at 24. The GAO Report cites numerous examples of inconsistent regulatory approaches. Furthermore, unlike its counsel, the Corps does not deny the haphazard nature of its exercise of authority.

Indeed, the Corps admitted to the GAO that the regulatory definitions used to make the critical jurisdictional determinations that underlie the Section 402 and 404 permitting programs are *intentionally* vague. *Id.* at 26. Accordingly, "Corps headquarters officials told [the GAO] that the existence of differences in jurisdictional determination practices among Corps districts is not surprising." *Id.*

After reviewing the GAO Report, the Assistant Secretary of the Army (Civil Works) concurred with the GAO's conclusions. *Id.* at 37. Particularly relevant to this case, the Assistant Secretary agreed that:

> the existing regulations do not contain a definition of the term 'tributaries', nor do they explain how 'adjacency' is to be established for purposes of Clean Water Act jurisdiction. This absence of clarity has led field personnel to draw different conclusion about the meaning of these terms and whether or not they cover certain manmade conveyances, such as certain ditches and pipes.

Id. at 37. Despite the acknowledged lack of regulatory clarity, the government has refused to engage in further rulemaking to clarify the basis for jurisdictional determinations. EPA Press Release: *EPA and Army Corps Issue Wetlands Decision*, (December 16, 2003).

Accordingly, this Court must provide the guidance that is so evidently and desperately needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

TIMOTHY S. BISHOP
RUSSELL R. EGGERT
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

DOUGLAS E. KAHLE
Counsel of Record
MARK R. BAUMGARTNER
Pender & Coward, P.C.
222 Central Park Ave.
Virginia Beach, VA 23462
(757) 490-3000

MARCH 2003

(2)

No. 03-637

FILED
DEC 31 2003
OFFICE OF THE CLERK

In the

Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF JOHN A. RAPANOS AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

GREGORY T. BRODERICK
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae
John A. Rapanos and Pacific Legal Foundation

QUESTION PRESENTED

Did the United States Army Corps of Engineers exceed the scope of federal jurisdiction under the Clean Water Act by penalizing a property owner for filling isolated wetlands that do not abut a body of open water but lie several miles from the nearest navigable waterway?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

STATEMENT OF THE CASE 4

ARGUMENT 5

I. THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF LAW BECAUSE IT INJECTS FEDERAL OVERSIGHT INTO AN AREA OF TRADITIONAL STATE CONTROL AND DISPLACES STATE AUTHORITY OVER LAND USE PLANNING 5

A. The Decision Below Interprets the Clean Water Act to Extend Federal Jurisdiction Deep into an Area of Traditional State Concern 5

B. The Decision Below Extends Federal Jurisdiction over Hundreds of Millions of Acres of Land and Imposes Harsh Burdens on Property Owners 9

II. THE DECISION BELOW HIGHLIGHTS THE CONFLICT AND CONFUSION IN BOTH THE LOWER COURTS AND ADMINISTRATIVE AGENCIES OVER THE SCOPE OF FEDERAL JURISDICTION UNDER THE CLEAN WATER ACT 11

A. The Lower Courts Are in Direct and Express Conflict over the Scope of Federal Jurisdiction Under the Clean Water Act 11

TABLE OF CONTENTS—Continued

Page

B. Congress, Administrative Agencies, and the Executive Branch Officials Are Baffled as to the Proper Scope of Federal Jurisdiction After *SWANCC* 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases

FD & P Enterprises, Inc. v. United States Army Corps of Engineers, 239 F. Supp. 2d 509 (D.N.J. 2003) 11

Headwaters, Inc. v. Talent, 243 F.3d 526 (9th Cir. 2003) 11

In re Needham, No. 02-30217, 2003 WL 22953383 (5th Cir. Dec. 16, 2003) 2-3, 12-13

Laguna Gatuna, Inc. v. United States, 50 Fed. Cl. 336 (2001) 11

Rapanos v. United States, 533 U.S. 913 (2001) 1

Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001) 11-12

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 1-3, 5

Treacy v. Newdunn Associates LLP, 344 F.3d 407 (4th Cir. 2003) 5, 13

United States v. Deaton, 332 F.3d 698 (4th Cir., 2003) 2, 11

United States v. Mills, 36 F.3d 1052 (11th Cir. 1994) 8

United States v. Newdunn Associates, 195 F. Supp. 2d 751 (E.D. Va. 2002) 4

United States v. Pozsgai, 757 F. Supp. 21 (E.D. Pa. 1991) 8

United States v. Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. 2002) 1, 7

TABLE OF AUTHORITIES—Continued

Page

United States v. Rapanos,
339 F.3d 447 (6th Cir. 2003) 2, 11

United States v. Riverside Bayview Homes,
474 U.S.121 (1985) 2

United States v. Rueth Development Co.,
335 F.3d 598 (7th Cir. 2003) 11

United States v. Wilson,
133 F.3d 251 (4th Cir. 1997) 8

Statutes

33 U.S.C. § 1251(b) 5

West's Fla. Stat. Ann. § 187.201(15)(b)(3) 6

Regulation

68 Fed. Reg. 1991 (Jan. 15, 2003) 13-14

Rules

Supreme Court Rule 37.2 1

Rule 37.6 1

Miscellaneous

Barron, David J., *Reclaiming Home Rule*,
116 Harv. L. Rev. 2255 (2003) 6-7

Briffault, Richard, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1 (1990) 9

Bryn, Eric M., *Through a BioDiversity Looking-Glass: An Analysis of the Devils Lake Basin Water Management Plan*,
1 Great Plains Nat. Resources J. 65 (1996) 6

TABLE OF AUTHORITIES—Continued

Page

Burling, James S., *Private Property Rights and the Environment After* Palazzolo, 30 B.C. Envtl. Aff. L. Rev. 1 (2002) 7

Fairfax County Comprehensive Plan, 2003 Edition, http://www.fairfaxcounty.gov/gov/ocp/comprehensiveplan/policyplan/preface.pdf 6

Gardner, Royal C., *Money for Nothing? The Rise of Wetland Fee Mitigation*, 19 Va. Envtl. L.J. 1 (2000) 9

Garnett, Nicole Stelle, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 Wm. & Mary L. Rev. 1191 (2001) 5-6

Guttery, Randall S., et al., *Federal Wetlands Regulation: Restrictions on the Nationwide Permit Program and the Implications for Residential Property Owners*, 37 Am. Bus. L.J. 299 (2000) 10-11

Holman, IV, J. Blanding, *Note: After* United States v. Lopez: *Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139 (1995) 5-6

Liebesman, Lawrence R., *Judicial, Administrative, and Congressional Responses to* SWANCC, 33 Envtl. L. Rep. 10899 (2003) 11-12

Lundin, Lauren A., *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 Fordham Envtl. L.J. 43 (1993) 8

Marshall, Bob, *USFWS Contradicts Administration's Plans*, Times-Picayune, Dec. 7, 2003, 2003 WL 60081434 14

TABLE OF AUTHORITIES—Continued

Page

Marzulla, Roger, et al., *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 Admin. L.J. Am. U. 253 (1995) .. 7-8

Michigan's Land, Michigan's Future, http://www.michiganlanduse.org/finalbysection.htm (Dec. 23, 2003) 6

Shuster, Bud & Hayes, Jimmy, *Big Lie on Clean Water*, Wash. Post, May 16, 1995 8

Schulte, Christopher J., *Minnesota Wetland Conservation Act of 1991: "Did Minnesota Miss the Boat to Protect Artificially Created Wetlands?,"* 15 Hamline L. Rev. 439 (1992) 9

Statement of M. Reed Hopper to the House Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs: Federal Authority to Require Wetlands Dumping Permits, 2002 WL 31123945 (Sept. 12, 2002) .. 3, 14-15

Statement of Thomas L. Sansonetti, Assistant Attorney General for Environment and Natural Resources, Department of Justice, Subcommittee on Fisheries, Wildlife and Water, Committee on Senate Environment and Public Works, 2003 WL 21350389 (June 23, 2003) ... 15

Sunding, David L. & Zilberman, David, *Non-Federal and Non-Regulatory Approaches to Wetlands Conservation: A Post* SWANCC *Exploration of Conservation Alternatives* (Jan. 2003), http://www.housingandenvironment.org/Text%20Files/Wetlands_Final.PDF 9-10

TABLE OF AUTHORITIES—Continued

Page

Sunding, David L. & Zilberman, David, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59 (2002) . . . 10

White House Backs Off on Wetlands Issue, Wall St. J., Dec. 17, 2003, 2003 WL-WSJ 68131243 14

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, John A. Rapanos and Pacific Legal Foundation respectfully submit this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

John A. Rapanos is the owner of a 175-acre tract in Williams Township, Bay County, Michigan, located west of Bay City on Interstate 95. In an effort to develop his property for commercial use, he set up a sawmill, cleared the "heavily wooded plot," removed the stumps, and filled some of the wetlands with sand. *See United States v. Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002). Though his property lies approximately twenty miles from the nearest navigable waterway, the United States asserted jurisdiction over the property and Mr. Rapanos was prosecuted for discharging fill into "waters of the United States" without the appropriate permit. *See id.* Mr. Rapanos was tried and convicted, fined $185,000, and sentenced to three years probation. *See id.* at 1013. The conviction was upheld on appeal, but this Court granted a writ of certiorari, vacated the conviction, and remanded the case back to the Sixth Circuit for a determination consistent with *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). *See Rapanos v. United States*, 533 U.S. 913 (2001).

The district court found that federal jurisdiction was improper after *SWANCC*, *see United States v. Rapanos*, 190 F. Supp. 2d at 1017, but the Sixth Circuit reversed that determination and further directed the trial court to increase the

---

[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

sentence to include a minimum of ten months in prison. *See United States v. Rapanos*, 339 F.3d 447, 454 (6th Cir. 2003). The Sixth Circuit based its decision in Mr. Rapanos's case on the same Fourth Circuit case that the court below relied on here: *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). *See Rapanos*, 339 F.3d at 452. The interpretation of the Clean Water Act adopted in both *Rapanos* and *Deaton* has been explicitly rejected by the Fifth Circuit's *In re Needham* decision. No. 02-30217, 2003 WL 22953383 (5th Cir. Dec. 16, 2003). Mr. Rapanos has filed a petition for writ of certiorari with this Court and thus has a significant stake in the determination of this case. *See Rapanos v. United States*, Docket No. 03-929.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, public interest law foundation of its kind in America, incorporated for the purpose of litigating in the public interest. For 30 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property and has advocated a balanced approach to environmental issues. PLF supports the concept of limited government, the appropriate balance between federal and state power, and the principle that the environment must be protected in a manner that is consistent with other needs of society.

PLF attorneys have participated before this Court on several occasions involving interpretations of the Clean Water Act (CWA). For example, PLF attorneys participated as amicus curiae in *SWANCC*, 531 U.S. 159, and *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). PLF attorneys also represent John A. Rapanos on his petition before this Court which raises issues that are nearly identical to those in this case. And, PLF attorneys have offered nonpartisan testimony before Congress on the scope of federal jurisdiction under the Clean Water Act. *See Statement of M. Reed Hopper to the House Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs: Federal*

Authority to Require Wetlands Dumping Permits, 2002 WL 31123945 (Sept. 12, 2002). PLF believes that its experience in this area will provide an additional, valuable, and informed viewpoint on the issues presented in this case.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be granted because the lower court's decision raises important questions of federal law. Specifically, the decision below misinterprets the Clean Water Act by upholding federal jurisdiction over nonnavigable, intrastate wetlands that do not abut a navigable waterway. The Fourth Circuit has effectively displaced local decisionmaking with federal land use planning. This decision grants federal officials a virtual veto power over land use for hundreds of millions of acres, thereby undermining local planning goals, state sovereignty, and the rights of property owners.

In addition, the three branches of government are in a state of confusion over the meaning of this Court's decision in *SWANCC* and the proper scope of federal jurisdiction under the Clean Water Act. Congress is holding hearings on the scope of *SWANCC* while the executive branch is unable to articulate a consistent statement on federal jurisdiction over wetlands. Most significantly, the lower federal courts openly and directly conflict with one another on the reach of the Clean Water Act. The Fifth Circuit, for example, recently expressly identified and rejected the Sixth Circuit's reasoning in *Rapanos*. *In re Needham*, 2003 WL 22953383, at *3. Thus, this Court should grant the Petition for Writ of Certiorari to resolve the controversy and confusion over the scope of federal jurisdiction under the Clean Water Act.

STATEMENT OF THE CASE

Newdunn Associates, L.L.P., and its agents, Orion Associates and Northwest Contractors Corporation, began various development activities on Newdunn's private property in June, 2001. *United States v. Newdunn Associates*, 195 F. Supp. 2d 751, 753 (E.D. Va. 2002). After some logging, excavation, and filling had been completed, the Army Corps of Engineers and the State of Virginia brought enforcement actions against Newdunn, both primarily complaining that Newdunn had failed to secure a federal permit before filling the wetlands. *See id.* at 754.

The Army Corps' jurisdiction was based solely on the presence of a surface hydrologic connection to navigable waters, *see id.* at 756, and the government does not dispute that the wetlands at issue in this case do not abut a navigable waterway. Rather, the district court found that "[r]ain generated runoff . . . occasionally exit[ed] the Property through a spur ditch" and into another set of nonadjacent wetlands. *Id.* at 757-58. From those wetlands, water occasionally flowed through a seasonal, manmade ditch which eventually ran into a culvert under Interstate 64 and into another manmade ditch. *See id.* at 758. Water "intermittently" flowed through that ditch for over one mile before entering the nonnavigable arm of the Western Stony Run. *Id.* The water then ran, again "intermittently," some distance downstream to a point where Stony Run becomes a navigable water. *Id.*

The District Court found that this "far exceeded the grant of authority by Congress in the CWA," *id.* at 765, and that there were "no definable limits to the Corps' definition of tributaries over which it possesses jurisdiction." *Id.* at 766. The trial court thus entered judgment for Newdunn because the Corps did not "have jurisdiction over the wetlands on the Newdunn Property." *Id.* at 771.

The Fourth Circuit Court of Appeals, however, reversed this ruling, finding that the intermittent surface hydrologic connection provided "a sufficient nexus between the Newdunn Wetlands and navigable waters-in-fact" to support federal jurisdiction under the Clean Water Act. *See Treacy v. Newdunn Associates LLP*, 344 F.3d 407, 417 (4th Cir. 2003). The Court rejected the federal jurisdictional argument in Footnote 5, finding that "Newdunn's insistence that *SWANCC* limited the Corps' jurisdiction solely to those wetlands adjacent to navigable waters-in-fact [wa]s *plainly incorrect*." *Id.* at 415 n.5 (emphasis added).

ARGUMENT

I

THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF LAW BECAUSE IT INJECTS FEDERAL OVERSIGHT INTO AN AREA OF TRADITIONAL STATE CONTROL AND DISPLACES STATE AUTHORITY OVER LAND USE PLANNING

A. The Decision Below Interprets the Clean Water Act to Extend Federal Jurisdiction Deep into an Area of Traditional State Concern

It is undisputed that land use planning is an area traditionally reserved to state and local governments. *See SWANCC*, 531 U.S. at 174 (recognizing the "States' traditional and primary power over land and water use"); *see also* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water. . . ."); J. Blanding Holman, IV, *Note: After* United States v. Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139, 140 (1995) (noting that the CWA involves the government in "land use regulation, an area traditionally of

local concern"). Indeed, land use is widely recognized as "perhaps the quintessential local responsibility." Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 Wm. & Mary L. Rev. 1191, 1205 (2001).

State and local planners must balance a wide variety of objectives when evaluating land use decisions in order to fulfill their general goal of "enhanc[ing] the livability and character of urban areas through the encouragement of an attractive and functional mix of living, working, shopping, and recreational activities." West's Fla. Stat. Ann. § 187.201(15)(b)(3). The state must account for myriad "social, political and legal obstacles confronting the intent of private landowners, state governments, and federal regulatory agencies" in the land-use process. Eric M. Bryn, *Through a BioDiversity Looking-Glass: An Analysis of the Devils Lake Basin Water Management Plan*, 1 Great Plains Nat. Resources J. 65, 81 (1996). Amicus John Rapanos's state of Michigan has identified more than twenty objectives for land use planning. *See Michigan's Land, Michigan's Future*, http://www.michiganlanduse.org /finalbysection.htm (Dec. 23, 2003). The bipartisan Michigan Land Use Leadership Council, formed by Governor Granholm, seeks to balance such diverse goals as "vibrant 'hip' cities," protection of scenic vistas, a healthy environment and healthy economy, energy efficiency, private property rights, expanded housing choices, "a 'Michigan solution'" to local land use issues, and effective local, multijurisdictional, and state planning. *See id.* at 22-23. Similar planning goals exist in Newdunn's state of Virginia. *See Fairfax County Comprehensive Plan*, 2003 Edition at 1, http://www.fairfaxcounty.gov/gov/ocp/comprehensiveplan/ policyplan/preface.pdf (outlining such goals as quality of life, transportation, energy conservation, and economic development). Through local control, communities may develop "broad goals at the state level," which "shaped locally,

can result in a workable legal regime" balancing societal needs with sustainable development. David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2366 n.457 (2003).

Displacing state authority with a burdensome federal regulatory scheme under the Clean Water Act distorts this process. It removes the state's ability to balance these complex goals and replaces it with a powerful, single-minded federal statute. Expanding federal jurisdiction over this delicately crafted system supplants the state's multi-factor planning and replaces it with a single, overriding federal purpose driven by the force of severe penalties. Amicus John Rapanos is facing 10-16 months *in a federal penitentiary* for filling wetlands on his private property with sand, a practice which was, for many years, encouraged as good public policy. *See* James S. Burling, *Private Property Rights and the Environment After* Palazzolo, 30 B.C. Envtl. Aff. L. Rev. 1, 37 (2002). If Newdunn's case is remanded to the lower court as ordered by the Fourth Circuit, he will face similar penalties for engaging in this routine practice. Further, Mr. Rapanos was tried solely for depositing sand in the wetlands without a federal permit, not from any resulting environmental damage or impairment of navigable waters. *See United States v. Rapanos*, 190 F. Supp. 2d at 1012. Indeed, Mr. Rapanos's wetlands are some 20 miles from the nearest navigable waterway and the only basis for federal jurisdiction is, as here, a remote surface hydrologic connection. *See id.* at 1014. Like Mr. Rapanos's wetlands, the *Newdunn* property is only hydrologically connected to a distant navigable water by a series of intermittent ditches, culverts, and streams, the majority of which are man-made.

The *Newdunn* and *Rapanos* situations are unfortunately not rare exceptions to Corps enforcement but the rule. Most famously, elderly Florida resident Ocie Mills and his son were "sent to prison for depositing sand on his privately-owned wetlands that the public had decided it wanted but was unwilling to purchase." Roger Marzulla, et al., *Taking*

"Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress, 9 Admin. L.J. Am. U. 253, 260 (1995). They each received 21 months in jail, one year of supervised release, and were fined. *See United States v. Mills*, 36 F.3d 1052, 1055 (11th Cir. 1994).

In another well-publicized case, John Pozsgai was sentenced to three years imprisonment, five years probation, and fined $200,000 for placing clean fill in wetlands in Eastern Pennsylvania. *See United States v. Pozsgai*, 757 F. Supp. 21, 22 (E.D. Pa. 1991). Members of Congress described the Corps' behavior towards Mr. Pozsgai as "dictatorial" and "Gestapo-like." Bud Shuster & Jimmy Hayes, *Big Lie on Clean Water*, Wash. Post, May 16, 1995, at A17. There are others. *See, e.g., United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997) (noting that Wilson was sentenced to 21 months in prison and $1 million in fines for filling nonadjacent wetlands that drained to ditches, intermittent streams, and creeks). But equally significant, the very real threat of imprisonment deters landowners from making full use of their property and coerces them to accept federal intrusions. *See* Lauren A. Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 Fordham Envtl. L.J. 43, 64 (1993) (describing the well-known deterrent effect of jail time for environmental "crimes" on otherwise law-abiding citizens).

Expanding federal jurisdiction into this traditional state area does not simply result in inconvenience or disruption in the local land use process planning but rather subjugates a state's numerous goals to one overriding federal objective backed up by draconian penalties. There are currently three petitions for writ of certiorari pending before this Court questioning the scope of federal jurisdiction under the Clean Water Act: This case, *Deaton v. United States* (Docket No. 03-701), and *Rapanos v. United States* (Docket No. 03-929). This important question of law requires resolution from this Court.

B. The Decision Below Extends Federal Jurisdiction over Hundreds of Millions of Acres of Land and Imposes Harsh Burdens on Property Owners

Interpreting the phrase "waters of the United States" in the Clean Water Act to include any water with a hydrologic connection to a navigable water greatly expands federal jurisdiction and displaces state authority in one of its primary areas of responsibility. While it is unclear just how many millions of acres of wetlands exist in the United States, the number is enormous. By some estimates, there are as many as three hundred million acres of wetlands over which the Corps exercises jurisdiction. *See* Christopher J. Schulte, *Minnesota Wetland Conservation Act of 1991: "Did Minnesota Miss the Boat to Protect Artificially Created Wetlands?,"* 15 Hamline L. Rev. 439, 444 (1992) (explaining that, under the Federal Wetlands Manual operational before *SWANCC*, "the jurisdictional reach of the federal government has been estimated to have increased from the previous 105 million acres to between 200 and 300 million acres"). In Minnesota, *20%* of the state is made up of wetlands. David L. Sunding & David Zilberman, *Non-Federal and Non-Regulatory Approaches to Wetlands Conservation*: *A Post* SWANCC *Exploration of Conservation Alternatives* at 11 (Jan. 2003), http://www.housingandenvironment.org/Text%20Files/Wetlands_Final.PDF (hereinafter *The Sunding Permitting Study*). Alaska has an estimated 170 million acres of wetlands while Florida, Louisiana, Texas, North Carolina, Michigan, Wisconsin, and Maine contain over 5 million acres of wetlands each. *See* Royal C. Gardner, *Money for Nothing? The Rise of Wetland Fee Mitigation*, 19 Va. Envtl. L.J. 1, 19 n.99 (2000).

This extension of federal jurisdiction over such a vast expanse of land is startling given that "[l]and use control is the most important local regulatory power." Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 3 (1990). Under the lower court's reasoning,

states surrender their traditional primary control over land use and, instead, must send their citizens to seek centralized, federal approval for local projects.

States will not be alone in suffering harm if the lower court's decision is not reviewed. Individual property owners, already forced to run the hazardous gambit of the local land use planning process, will have to further endure an expensive and burdensome federal review process. *The Sunding Permitting Study* concludes that it takes an average of 788 days—two years and two months—to receive a section 404(a) permit. *See The Sunding Permitting Study*, *infra* p. 9, at 8. The lengthiest permit took 1,884 days to grant, an astonishing 5 years and 2 months, *see id.* at 8 n.16, while the mean individual cost for a section 404(a) permit was $271,596. *See id.* at 7. Moreover, these figures are extremely understated because they cover only the costs for labor in putting together the permit and do not account for mitigation conditions attached to the permits, the effect on the local economy, or delay and costs associated with the oft-required redesign of the project. *See id.*

The burdensome costs of individual permit applications are particularly important given the $760 billion that construction and development activity contribute to the economy on an annual basis. *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 81 (2002). The sale price of property with federally regulated wetlands is devalued by over 10% due solely to the burdens of dealing with the federal regulatory process. *See* Randall S. Guttery, et al., *Federal Wetlands Regulation: Restrictions on the Nationwide Permit Program and the Implications for Residential Property Owners*, 37 Am. Bus. L.J. 299, 329 (2000). Significantly, this devaluation of land is also present when a property is even *likely* to be delineated as a federally protected wetland. *See id.* at 316. Not surprisingly, these development costs are passed

on, though to an unknown extent, to individual home buyers. *See id.* at 316 & n.83.

Thus, this case presents an important question regarding the scope of federal jurisdiction over wetlands under the Clean Water Act. Because the decision below permits the federal government to intrude into the state's primary control over land use planning and has such severe impacts on both the economy and property owners, the Court should grant the Petition for Writ of Certiorari and clarify the scope of federal jurisdiction under the Clean Water Act.

II

THE DECISION BELOW HIGHLIGHTS THE CONFLICT AND CONFUSION IN BOTH THE LOWER COURTS AND ADMINISTRATIVE AGENCIES OVER THE SCOPE OF FEDERAL JURISDICTION UNDER THE CLEAN WATER ACT

A. The Lower Courts Are in Direct and Express Conflict over the Scope of Federal Jurisdiction Under the Clean Water Act

In the fewer than three years since this Court decided *SWANCC*, dozens of courts have been called upon to determine the scope of federal jurisdiction under the Clean Water Act. *See* Lawrence R. Liebesman, *Judicial, Administrative, and Congressional Responses to* SWANCC, 33 Envtl. L. Rep. 10899 (2003) (surveying the post-*SWANCC* decisions in the district courts and Courts of Appeals). *See also United States v. Rapanos*, 339 F.3d 447, *petition for writ of certiorari pending*, *United States v. Deaton*, 332 F.3d 698, *petition for writ of certiorari pending*, *United States v. Rueth Development Co.*, 335 F.3d 598 (7th Cir. 2003), *Headwaters, Inc. v. Talent*, 243 F.3d 526 (9th Cir. 2003), *FD & P Enterprises, Inc. v. United States Army Corps of Engineers*, 239 F. Supp. 2d 509, (D.N.J. 2003), *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001), *Rice v. Harken Exploration Co.*, 250 F.3d 264

(5th Cir. 2001). The decisions have failed to craft a consistent standard and "[t]he split in interpretation among the courts wrestling with the *SWANCC* decision is deep and was instantaneous." Liebesman, 33 Envtl. L. Rep. at 10899.

Specifically, the decision below is in agreement with the Fourth Circuit's decision in *United States v. Deaton* and the Sixth Circuit's decision in *United States v. Rapanos*, both currently on petition for writ of certiorari before this Court, and in direct conflict with the Fifth Circuit's decisions in *Rice v. Harken Exploration Co.*, 250 F.3d 264, and *In re Needham*, 2003 WL 22953383. *Harken* determined that the scope of federal jurisdiction under the Oil Pollution Act was concurrent with jurisdiction under the Clean Water Act. 250 F.3d. at 267. There, Harken Exploration Company discharged various pollutants into a nonnavigable creek that flowed into a navigable river. *Id.* at 265. The plaintiffs brought suit under the Oil Pollution Act to compel Rice to pay the alleged $38 million dollar cleanup costs. In upholding the district court's dismissal, the Fifth Circuit concluded that "[u]nder *Solid Waste Agency*, it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." *Id.* at 269. This interpretation of the Clean Water Act is in direct opposition to that offered by the court below and by the Sixth Circuit in *Rapanos*.

In re Needham even more explicitly rejects the reasoning of other circuit courts of appeals. 2003 WL 22953383, at *4. In another Oil Pollution Act case, the Fifth Circuit re-affirmed that the scope of federal jurisdiction under that Act and CWA were "co-extensive" and then proceeded to determine whether the waters at issue were "waters of the United States." *Id.* at *2. In setting forth the standard for jurisdiction under the Clean Water Act, the *In re Needham* court expressly rejected the rationale expressed in *Rapanos* and *Deaton*, and adopted by the lower court in this case. *See id.* at *3. The court noted that the

definition pressed by the Army Corps and approved by the Fourth and Sixth Circuit Courts of Appeals

> includes as "navigable waters" all "tributaries" of navigable-in-fact waters. *See id.* at § 300.5(d). According to the government, the definition covers all waters, excluding groundwater, that have any hydrological connection with "navigable water."

Id. at *3.

"In our view," the *In re Needham* court declared, the *Rapanos/Deaton* definition of waters of the United States "is unsustainable under *SWANCC*." *Id.* The Fifth Circuit was careful to note that "the regulatory definition, if applied in this fashion, would push the Oil Pollution Act to the outer limits of the Commerce Clause and raise serious constitutional questions." *Id.* at *5 n.8.

The court below in this case, however, casually dismissed these constitutional concerns *in a footnote* as "plainly incorrect" and upheld the government's broad assertion of authority. *Newdunn*, 344 F.3d at 415 n.5. Thus, the circuit courts of appeals are in direct and unavoidable conflict over the permissible scope of federal jurisdiction after the *SWANCC* decision.

B. Congress, Administrative Agencies, and the Executive Branch Officials Are Baffled as to the Proper Scope of Federal Jurisdiction After *SWANCC*

The confusion over the post-*SWANCC* scope of federal jurisdiction under the Clean Water Act is not limited to the lower federal courts. Federal administrative agencies, Congress, and the Department of Justice have all offered conflicting and confusing interpretations of the new scope of jurisdiction. In response to *SWANCC*, the Army Corps and the Environmental Protection Agency issued an "Advance Notice

of Proposed Rulemaking" to clarify the scope of federal jurisdiction under the Act. 68 Fed. Reg. 1991 (Jan. 15, 2003). In that document, the EPA and the Corps ask the public for comment on the meaning of the *SWANCC* decision but concede that they "are now precluded from asserting CWA jurisdiction in such situations including waters such as isolated non-navigable, intrastate vernal pools, playa lakes, and pocosins." *Id.* at 1996. They recognized that *SWANCC* "also calls into question whether CWA jurisdiction over isolated intrastate, non-navigable waters could now be predicated on the other factors" found in federal regulations like "use of water as habitat for birds protected by Migratory Bird Treaties; use of water as habitat by Federally protected endangered or threatened species; or use of the water to irrigate crops sold in interstate commerce." *Id.*

In November, the *Los Angeles Times* published a "leaked" copy of draft language for the future regulation removing federal control over "ephemeral" or seasonal wetlands and restricting jurisdiction to waters with a surface hydrologic connection to navigable waters. *See* Bob Marshall, *USFWS Contradicts Administration's Plans*, Times-Picayune, Dec. 7, 2003, at 16, 2003 WL 60081434 (noting that a draft copy of the regulations were "leaked to the Sierra Club"). After several weeks of public debate and criticism, though, the administration decided that it would not even issue *proposed* regulations. *See White House Backs Off on Wetlands Issue*, Wall St. J., Dec. 17, 2003, at B6, 2003 WL-WSJ 68131243 ("Bowing to criticism from Congress and the public, the Bush administration is backing away from a proposal that would have weakened federal jurisdiction over some U.S. wetlands."). Thus, it seems, the Administration requires further guidance from this Court on the proper scope of federal jurisdiction.

Congress has also held hearings on the impact of the *SWANCC* decision. *See Statement of M. Reed Hopper to the House Committee on Government Reform, Subcommittee on*

Energy Policy, Natural Resources and Regulatory Affairs: Federal Authority to Require Wetlands Dumping Permits, 2002 WL 31123945 (stating that "the Supreme Court unambiguously limited the authority of the EPA and the Corps, under section 404(a) of the Clean Water Act, to waters that are traditionally navigable or to those waters (including wetlands) that are adjacent to traditionally navigable waters"). During the hearing, experts offered a variety of opinions but the committee reached no conclusions or solutions. The Department of Justice has also participated in congressional hearings on the topic of "Federal Jurisdiction of Navigable Waters Under Clean Waters," and has expressed concern over the lack of certainty in this area. *See Statement of Thomas L. Sansonetti, Assistant Attorney General for Environment and Natural Resources, Department of Justice, Subcommittee on Fisheries, Wildlife and Water, Committee on Senate Environment and Public Works*, 2003 WL 21350389 (June 23, 2003). Mr. Sansonetti noted that "the post-*SWANCC* case law remains unsettled as we are involved in at least nine *SWANCC*-related cases in the Courts of Appeals for the Fourth, Fifth, Sixth, Seventh, and Ninth Circuits." *Id.*

Thus, there is a direct and significant conflict in the lower federal courts, and no agreement among federal administrative agencies, Congress, and the Department of Justice about the scope of federal jurisdiction under the Clean Water Act. At present, therefore, both landowners and administrators are forced to rely on a patchwork of conflicting circuit court decisions which produces varying, inconsistent results.

CONCLUSION

The court below has sanctioned a substantial and dangerous infliction of federal power on the local planning process. Given the conflict among the lower courts and the confusion among the political branches, it is up to this Court to untangle the disorder surrounding the appropriate scope of federal jurisdiction under the Clean Water Act. Thus, this Court should grant the Petition for Writ of Certiorari.

DATED: December, 2003.

Respectfully submitted,

GREGORY T. BRODERICK
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae
John A. Rapanos and Pacific Legal Foundation

(3)

No. 03-637

Supreme Court, U.S.
FILED
DEC 3 1 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

JOHN J. RADEMACHER *
General Counsel
AMERICAN FARM BUREAU FEDERATION
225 Touhy Avenue
Park Ridge, IL 60068
(847) 685-8732

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
ARGUMENT	3
I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONGST THE CIRCUITS OVER THE REACH OF SECTON 404 REGULATORY JURISDICTION	5
II. CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT CAN RESOLVE THE UNCERTAINTY AS TO WHAT ARE JURISDICTIONAL NON-AJACENT WETLANDS	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001) 4, 6

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ..... *passim*

United States v. Needham, _____ F.3d _____ (5th Cir. 2003) 4, 6

United States v. Newdunn Associates, LLP, et al., 344 F.3d 407 (4th Cir. 2003) 6

United States v. Newdunn Associates, LLP, et al., 195 F. Supp. 2d 751 (E.D. Va. 2002) 5

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 3, 8

STATUTES AND REGULATIONS

Clean Water Act Section 404, 33 U.S.C § 1344.... *passim*

33 U.S.C. § 1362(7)..... 5

33 C.F.R. § 328.3(a)(1)..... 5

33 C.F.R. § 328(a)(5)..... 5

33 C.F.R. § 328(a)(7)..... 5

MISCELLANEOUS

EPA and Army Corps Issue Wetlands Decision, Headquarters Press Release, U.S. Environmental Protection Agency, December 16, 2003..... 9

EPA, Appellate Divisions May Return Water Act Battle To High Court, Inside EPA, December 19, 2003 9

U.S. Won't Narrow Wetlands Protection, New York Times, December 17, 2003..... 9

IN THE

Supreme Court of the United States

No. 03-637

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

The American Farm Bureau Federation respectfully submits this brief as *amicus curiae* with the written consent of the parties given and filed with the Clerk.[1]

INTEREST OF *AMICUS CURIAE*

The American Farm Bureau Federation ("Farm Bureau") is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Act of

[1] Counsel for *amicus curiae* have authored this brief in whole and no other person or entity other than amicus, its members or counsel have made a monetary contribution to the preparation or submission of the brief.

the State of Illinois. Farm Bureau was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. Farm Bureau has member organizations in all fifty states and Puerto Rico representing more than 5 million member families. Farm Bureau has participated as an amicus curiae in many cases in this Court and the courts of appeals involving issues of paramount concern for its farmer and rancher members, particularly cases such as this one that involve issues arising under Section 404 of the Clean Water Act ("CWA").

Farm Bureau farmer and rancher members produce virtually every kind of agricultural commodity produced commercially in the United States. They own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food and fiber and other basic necessities. Like all farmers and ranchers in the United States, they are increasingly becoming subject to restrictive regulations at the local, state and national levels that impair their ability to farm productively and profitably. Indeed, in some instances that ability is being eliminated altogether.

The protection of wetlands under Section 404 of the CWA is one of the more serious and contentious problems that production agriculture faces today. From its inception in 1972 and its court ordered expansion in 1975, the Section 404 permit program remains a controversial, complex and contentious program.

Farm Bureau has followed the wetlands protection evolution for nearly three decades and watched it take on a life of its own as it marched relentlessly up the hill consuming ever dryer lands. What was conceived as a statute to control the pollution of water has been stretched and turned into a national land use zoning act. Those forces which did not succeed in getting federal land use control legislation enacted

in the 1960s and early 1970s have seized upon the Section 404 program as one of the more effective mechanisms to impose federal regulatory measures on as much of the American landscape as possible.

Farm Bureau and its farmer and rancher members have a direct interest in the outcome of this case. One of the more problematic aspects of the Section 404 regulatory program is the uncertainty as to what are jurisdictional wetlands. Private property owners, especially farmers and ranchers who own the bulk of the lands upon which potential jurisdictional wetlands are to be found, are in desperate need of this Court's clarification of what are jurisdictional "non-adjacent wetlands" under Section 404 of the CWA and resolution of the split amongst the circuits on the jurisdictional reach of the Section 404 regulatory program.

ARGUMENT

Thus far this Court, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), has determined only "navigable" and "adjacent wetlands" to be jurisdictional wetlands under the CWA. By way of a footnote, this Court left open the question of jurisdiction over wetlands that are "not adjacent to bodies of open waters." 474 U.S. at 132 n.8.

The U.S. Army Corps of Engineers ("Corps") has taken the most liberal of stances on the issue and has attempted to exert Section 404 jurisdiction over virtually any and all wetlands no matter how isolated or remote. In overturning the Corps' "migratory bird rule", this Court recently offered further guidance on the extent of the Corps' jurisdiction under Section 404 in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). In *SWANCC*, this Court found that the plain text and import of Section 404 is that it reaches only waters and wetlands that have a "sufficient nexus" and are "inseparably bound up with" waters of the United States, and

applying that standard, does not reach "nonnavigable, isolated, intrastate waters." *Id.* at 169-170.

In response to *SWANCC*, the Corps effectively substituted the "migratory bird rule" with a "migratory raindrop rule" in its Section 404 regulatory posture. The Corps has asserted, in this and other cases, federal regulatory authority over wetlands that have only an ephemeral, intermittent, occasional and indirect man-made hydrological connection to navigable waters located miles distant.

The Fourth Circuit in this case has upheld the Corps' broad assertion of Section 404 jurisdiction. The Fourth Circuit's decision allows the Corps to impose its Section 404 regulatory burdens on any land use activity in any wetland from which a drop of water may ultimately find its way to navigable waters. The Fourth Circuit even found that man-made ditches and culverts were waters of the United States.

The Fourth Circuit's decision in this case is not only at odds with this Court's decision in *SWANCC*, but also in direct conflict with the decisions of the Fifth Circuit interpreting and applying the guidance set forth in *SWANCC*. The Fifth Circuit, first in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), and most recently in its December 16, 2003 decision in *United States v. Needham*, _____ F.3d _____ (5th Cir. 2003), reads *SWANCC* to authorize Section 404 jurisdiction over waters that are actually navigable or adjacent to an open body of navigable water. The Fifth Circuit determined small seasonal creeks and intermittent streams which only infrequently contain running water not to be sufficiently linked to navigable waters to qualify themselves as navigable waters.

Thus, there is a need for this Court to grant certiorari to resolve the conflict amongst the circuits over the authority of the Corps to regulate discharges of dredged or fill material into wetlands that are not adjacent to bodies of open waters

and to further clarify its guidance in *SWANCC* to the effect that wetlands that are not adjacent to actually navigable waters do not have a "sufficient nexus" to be jurisdictional wetlands under Section 404 of the CWA.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONGST THE CIRCUITS OVER THE REACH OF SECTION 404 REGULATORY JURISDICTION

This case originated as a CWA Section 404 enforcement action by the Corps for unauthorized activities in a wetland. Section 404 regulates "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The CWA does not define "waters of the United States." Corps regulations define "waters of the United States" to include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" (33 C.F.R. § 328.3(a)(1)), tributaries of such waters (33 C.F.R. § 328(a)(5)), and wetlands adjacent to such waters or their tributaries. 33 C.F.R. § 328.3(a)(7). Corps regulations do not define "tributaries" and do not define manmade ditches for drainage or irrigation as navigable waters of the United States.

The trial court ruled that the Corps did not have jurisdiction over the wetlands in question. *United States v. Newdunn Associates, LLP, et al.*, 195 F. Supp. 2d 751 (E.D. Va., 2002). The Corps had claimed jurisdiction upon the basis of a hydrological connection between the wetlands and the navigable portion of a stream some miles distant. The trial court carefully traced the tenuous hydrological connection involved through a spur ditch, a man made drainage ditch and

through a culvert under an interstate highway. The trial court, applying this Court's guidance in *SWANCC*, concluded that the Corps had not established a sufficient connection between the wetlands in question and navigable waters or waters of the United States. The trial court rejected the Corps' assertion that a culvert or storm drain pipe is a "tributary." The trial court opined that the Corps' assertion of jurisdiction over the wetlands in question far exceeded the grant of authority by Congress in the CWA.

On appeal, the Fourth Circuit reversed. *United States v. Newdunn Associates, LLP, et al.*, 344 F.3d 407 (4th Cir. 2003). The Fourth Circuit held that there was a "sufficient nexus" in the attenuated connections between the wetlands and the navigable portion of a stream. The Fourth Circuit's decision allows the Corps to assert Section 404 jurisdiction over wetlands adjacent to nonnavigable tributaries of navigable waters, and to consider intermittent and ephemeral waters in man made ditches, culverts and drains located miles distant from navigable waters as "tributary."

The Fourth Circuit's decision in this case is in direct conflict with decisions of the Fifth Circuit. The Fifth Circuit was the first court of appeals to consider the jurisdictional scope of the term "navigable waters" after *SWANCC*. In *Rice v. Harken Exploration Co.*, *supra*, the Fifth Circuit retreated from its previous broad interpretation and ruled that federal regulatory authority does not extend to waters or wetlands "that have only an indirect, remote and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272.

The Fifth Circuit has most recently reconsidered and reaffirmed its position on navigable waters taken in *Rice*. On December 16, 2003, the Fifth Circuit issued its decision in *United States v. Needham*, *supra*, and stated therein:

> The OPA imposes strict liability upon parties that discharge oil into "navigable waters," a term defined in the statute to mean "the waters of the United States,

including the territorial sea." 33 U.S.C. § 2701(21) (2000)). [Footnote omitted.] This is co-extensive with the definition found in the Clean Water Act ("CWA"). *See Rice v. Harken Exploration Co.*, 250 F.3d 264, 267 (5th Cir. 2001) (citing 33 U.S.C. § 1362(7) (2000)). [Footnote omitted.] *Rice* establishes that the OPA, like the CWA, does not extend federal regulation to the outermost limits of the Commerce Clause. *Id.* at 269-70.

Although under both the OPA and the CWA "waters and wetlands need not always be navigable-in-fact to be protected," *id.* at 268, the Supreme Court recently found the inclusion within "waters of the United States" of certain isolated, non-navigable waters exceeded the Army Corps of Engineers' regulatory power under the CWA. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC"), 531 U.S. 159, 172-74, 121 S.Ct. 675, 682-84 (2001). The Court emphasized that these isolated bodies of water were neither navigable-in-fact nor adjacent to open water. *Id.* at 168.

* * *

Nevertheless, the United States urges this court to approve its regulatory definition of "navigable waters." *See* 40 C.F.R. § 300.5 (2003). This definition includes as "navigable waters" all "tributaries" of navigable-in-fact waters. *See id.* at § 300.5(d). According to the government, the definition covers all waters, excluding groundwaters, that have any hydrological connection with "navigable water." At least two courts appear to have agreed with this expansive interpretation. *See United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) (asserting authority, under the CWA, over wetlands that are "adjacent to, and drain into, a roadside ditch whose waters eventually flow into navigable Wicomico River and Chesapeake Bay"); *United States v. Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003) (asserting

> authority, under the CWA, over wetlands that flow into a man-made drain, which in turn flows into a creek, which in turn flows into a navigable river).
>
> In our view, this definition is unsustainable under *SWANCC*. The CWA and the OPA are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters. *See Rice*, 250 F.3d at 269. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269.

Slip Opinion, pp. 7-8.

As a result, there currently exists disparate wetland regulation for property owners in the Fourth and Sixth Circuits versus the owners of property in the Fifth Circuit. Such disparate regulation of wetlands is untenable. Property owners are entitled to consistent regulatory treatment under Section 404 of the CWA throughout the United States. This Court should, therefore, grant certiorari to resolve the conflict, and to more clearly define jurisdictional "non-adjacent wetlands."

II. CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT CAN RESOLVE THE UNCERTAINTY AS TO WHAT ARE JURISDICTIONAL NON-ADJACENT WETLANDS

As the split amongst the circuits obviates, there is a great need for this Court to decide the important issue which it specifically reserved in *United States v. Riverside Bayview Homes, Inc.*, *supra*, as to what are jurisdictional non-adjacent wetlands. This Court narrowed the issue in *SWANCC* by holding that the Corps' Section 404 jurisdiction does not reach ponds not adjacent to navigable waters that are used by

migratory birds. This Court found that the plain text and import of Section 404 is that it reaches only waters and wetlands that have a "sufficient nexus" and are "inseparably bound up with" navigable waters, and that applying that standard Section 404 does not reach "nonnavigable, isolated, intrastate waters." 531 U.S. 167, 169-170.

Since *SWANCC*, the Corps has been successful in the Fourth and Sixth Circuits in advancing a regulatory posture of asserting Section 404 jurisdiction over all water with any hydrological connection to navigable waters, no matter how remote and attenuated. In so doing, the Corps has effectively replaced the "migratory bird rule" with a more potent "migratory raindrop rule" that leaves virtually no water anywhere in the nation beyond the Corps' regulatory reach.

In the wake of *SWANCC*, the Corps had sought public comment to determine if further regulatory clarification was needed. However, on December 16, 2003, the Environmental Protection Agency ("EPA") and the Corps issued a joint press release announcing that they would not be issuing a new rule on federal regulatory jurisdiction over isolated wetlands. *EPA and Army Corps Issue Wetlands Decision*, Headquarters Press Release, U. S. Environmental Protection Agency, December 16, 2003. In so doing, the EPA and the Corps reportedly jettisoned an internal draft of revised rules in response to *SWANCC* that proposed withdrawing federal protection from many isolated wetlands and intermittent streams. See *U.S. Won't Narrow Wetlands Protection*, New York Times, December 17, 2003. In dropping plans for rulemaking, the agencies indicated that, with the degree of success they have realized in the Fourth and Sixth Circuits, they were content to allow the courts to clarify the bounds of Corps' Section 404 jurisdiction. See *EPA, Appellate Decisions May Return Water Act Battle To High Court*, Inside EPA, December 19, 2003 ("[EPA Administrator] Leavitt said the agency believes it should continue reviewing data on the

issue while allowing the 'courts to go forward and address the jurisdiction issue' on a case-by-case basis.").

Thus, without this Court's review in this case, the regulatory reach of the Section 404 wetlands program will exceed that which this Court fended off in *SWANCC*. Further, the regulatory reach of Section 404 will continue to be determined on an *ad hoc* basis with inconsistent results from different Corps divisions and courts. Whether the Corps asserts Section 404 jurisdiction over a particular wetland will depend upon where in the country the wetland is located. Such expansive and disparate regulation of wetlands is untenable.

Private property owners, especially America's farmers and ranchers upon whose lands the bulk of the non-adjacent wetlands are to be found, are entitled to consistent treatment under the CWA and its Section 404 program throughout the country. It is critical, therefore, that this Court grant certiorari to resolve the conflict amongst the circuits, to resolve the uncertainty as to what are jurisdictional non-adjacent wetlands, and to once again rein in regulatory overreaching by overzealous federal agencies.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN J. RADEMACHER *
General Counsel
AMERICAN FARM BUREAU
FEDERATION
225 Touhy Avenue
Park Ridge, IL 60068
(847) 685-8732

* Counsel of Record

Counsel for Amicus Curiae

(4)

No. 03-637

SUPREME COURT, U.S.
FILED
DEC 30 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE THE INDUSTRIAL DEVELOPMENT AUTHORITY OF THE CITY OF CHESAPEAKE, VIRGINIA IN SUPPORT OF THE PETITIONERS

GORDON B. TAYLOE, JR.
Counsel of Record
LEAH M. DAVENPORT
KELLAM, PICKRELL, COX & TAYLOE, P.C.
300 Bank of Commonwealth Building
403 Boush Street
Norfolk, VA 23510
(757) 627-8365

Attorneys for Amicus Curiae

184924

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the United States Army Corps of Engineers may, consistent with the Clean Water Act, exercise regulatory jurisdiction over wetlands that are not adjacent or contiguous to open waters, but from which rainwater runoff may occasionally reach navigable waters located miles away through a series of manmade, indirect, ephemeral, and intermittent surface water connections.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTEREST OF AMICUS CURIAE 4

ARGUMENT 7

I. The United States Army Corps of Engineers has given itself limitless jurisdiction under the Clean Water Act, which Congress did not intend. 7

II. This Court has limited the Corps' jurisdiction under the Clean Water Act to wetlands that are adjacent to an open body of navigable water. 11

III. The United States Court of Appeals for the Fourth Circuit interpreted *SWANCC* incorrectly and its decision presently before this Court should be reversed. 13

CONCLUSION 17

TABLE OF CITED AUTHORITIES

Cases *Page*

Aiello v. Town of Brookhaven,
136 F. Supp.2d 81 (E.D.N.Y. 2001) 10

F D & P Enterprises v. United States Army Corps of Engineers,
239 F. Supp.2d 509 (D.N.J. 2003) 14, 15

Headwaters, Inc. v. Talent Irrigation Dist.,
243 F.3d 526 (9th Cir. 2001) 14

Rice v. Harken Exploration Co.,
250 F.3d 264 (5th Cir. 2001) 5, 6, 15

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,
531 U.S. 159 (2001) ..... *passim*

Treacy v. Newdunn Associates, LLP,
334 F.3d 407 (4th Cir. 2003) 2, 3, 4, 14

United States v. Deaton,
332 F.3d 698 (4th Cir. 2003) 14

United States v. Eidson,
108 F.3d 1336 (11th Cir. 1997) 15

United States v. Needham,
2003 U.S. App. LEXIS 25318 (5th Cir. 2003) ... 6, 16

Cited Authorities

Page

United States v. Newdunn Associates, LLP,
195 F. Supp.2d 751 (E.D.Va., 2002) 6, 16

United States v. Rapanos,
339 F.3d 447 (6th Cir. 2003) 15

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 11, 12

Constitutional Provisions, Statutes, and Regulations

33 C.F.R. § 328.3 9

33 U.S.C. § 1251(a) 7

33 U.S.C. § 1344(a) 5, 7, 11, 12

33 U.S.C. § 1362(7) 5, 7

33 U.S.C. § 1362(14) 10

33 U.S.C. § 2701 15

51 Fed. Reg. 41,217 ..... 5, 10

65 Fed. Reg. 12824-825 10

Virginia Code Ann. § 15.2- 4901 2

Virginia Code Ann. § 15.2- 4903 2

Cited Authorities

Page

Other Authorities

EPA & Corps, *Guidance for Asserting Federal Jurisdiction Over Isolated Wetlands in Response to U.S. Supreme Court Decision in SWANCC Case* (Jan. 10, 2003) ("Corps 2003 Guidance") . . . 5, 10

No. 03-637

IN THE

Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE THE INDUSTRIAL DEVELOPMENT AUTHORITY OF THE CITY OF CHESAPEAKE, VIRGINIA IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Amicus Industrial Development Authority of the City of Chesapeake, Virginia (the "IDA"), is a governmental entity

1. The Industrial Development Authority of the City of Chesapeake, Virginia, files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amicus Curiae, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

created by Virginia Code Ann. § 15.2-4903. The IDA was created with the principal purpose being to

> acquire, own, lease, and dispose of properties and make loans to the end that such authorities may be able to promote industry and develop trade by inducing manufacturing, industrial, governmental, nonprofit and commercial enterprises and institutions of higher education to locate in or remain in this Commonwealth . . . , and to vest such authorities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall be exercised for the benefit of the inhabitants of the Commonwealth, either through the increase in commerce, or through the promotion of their safety, health, welfare, convenience or prosperity.

Virginia Code Ann. § 15.2-4901.

The City of Chesapeake has an area of 353 square miles. Much of the undeveloped land in Chesapeake is designated as wetlands. The IDA acknowledges that wetlands adjacent to a navigable water are within the jurisdiction of the Clean Water Act (the "CWA"). However, the IDA is concerned with its wetlands that are not adjacent to a navigable water, which amount to approximately 396 acres.[2] Under the United States Court of Appeals for the Fourth Circuit's decision in *Treacy v. Newdunn Associates, LLP*, 334 F.3d 407 (4th Cir. 2003), the IDA is unable to sell any of its wetlands, even those not adjacent to a navigable water. This has and will continue to cause substantial economic hardship.

---

2. A map that details the wetlands of the City of Chesapeake is available upon request by this Court.

An example of this is a parcel of property named South Cavalier Industrial Park: Prior to the passage of the CWA, the IDA purchased property from an estate for the purposes of selling pieces of the land to developers. The IDA entered into a deed of trust that would be paid off as the property was sold. The IDA sold part of the property, which is now a developed industrial park. Whether the remaining property, that is adjacent to the industrial park, will be able to be sold and developed is dependant on this Court's interpretation of the jurisdiction of the CWA.

After the passage of the CWA, the remaining property was delineated as wetlands. The property became a wetland as a result of storm water runoff from the construction of the interchange of interstates 64 and 664. Prior to this construction, and at the time of purchase, this property was not a wetland. This wetland has no foreseeable connection with any navigable water. It is simply a manmade, non-tidal wetland. Nonetheless, using the same theory of jurisdiction as in *Newdunn Associates*, the Corps asserts that the property is subject to the CWA.

There is $300,000 of secured debt from the deed of trust on the remaining property. The only way to pay this debt is by release deed after selling the land. Under the Fourth Circuit's ruling in *Newdunn Associates*, the IDA is unable to sell the land because it is considered wetlands within the jurisdiction of the CWA. At an interest of approximately six percent over twenty years, plus the principal of $300,000, the IDA now has an intolerable debt which it could not have foreseen at the time of purchase.

If Petitioner's Writ of Certiorari is denied, the IDA is concerned that its property rights will continue to be impaired, and economic opportunities for the City of Chesapeake will continue to be compromised because of uncertainty as to the extent of the Corps' jurisdiction. Additionally, if Petitioner's Writ of Certiorari is affirmed, but the opinion by the United States Court of Appeals for the Fourth Circuit is not reversed, the IDA is concerned that its non-tidal wetlands will not be able to be sold or developed, causing a significant, negative economic effect for the City of Chesapeake. As a result, fundamental land use decisions will be made at the federal level rather than by the municipalities and states, as federalism intends.

SUMMARY OF ARGUMENT

The issue in this case is whether the United States Army Corps of Engineers (the "Corps") may assert jurisdiction under the Clean Water Act (the "CWA") over wetlands that are not adjacent or contiguous to navigable, open waters. The United States Court of Appeals for the Fourth Circuit expanded the jurisdiction of the Corps to include wetlands in which rainwater runoff may occasionally reach navigable waters located miles away through a series of manmade, indirect, ephemeral, and intermittent surface water connections. *See Treacy v. Newdunn Associates, LLP*, 334 F.3d 407 (4th Cir. 2003). The IDA asserts that the Fourth Circuit has incorrectly expanded the jurisdiction of the Corps under the CWA, and asks this Court to reverse the Fourth Circuit's ruling.

Prior to the Fourth Circuit's ruling, and since the enactment of the CWA, the Corps has been drafting regulations that gradually increased their jurisdiction.

According to the current regulations of the Corps, the Corps has virtually limitless jurisdiction under the CWA. *See, e.g.*, 51 Fed. Reg. 41,217 (1986) (The Corps reserves the right on a case-by-case basis to determine whether a particular waterbody is a water of the United States); EPA & Corps, *Guidance for Asserting Federal Jurisdiction Over Isolated Wetlands in Response to U.S. Supreme Court Decision in SWANCC Case* (Jan. 10, 2003) ("Corps 2003 Guidance") (No meaningful guidelines for an appropriate case-by-case review). This was not the intent of Congress when it passed the CWA.

Congress limited the Corps jurisdiction to "navigable waters", 33 U.S.C. § 1344(a) (2002) and "waters of the United States." *Id.* § 1362(7) (2002). It is highly unlikely that Congress intended such objects as manmade drainage and irrigation ditches to be within the jurisdiction of the Corps under the CWA. The Corps has exceeded the jurisdiction given to it by Congress in asserting jurisdiction over wetlands that are not adjacent to navigable waters.

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (SWANCC), 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001), this Court limited the jurisdiction of the Corps under the CWA to bodies of water that were actually navigable or that were adjacent to open bodies of water. 531 U.S. at 167-68.

The Fifth Circuit correctly read *SWANCC* as a substantial limit to CWA jurisdiction. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001). Based on its interpretation of *SWANCC*, the Fifth Circuit held that a small seasonal creek and intermittent streams that only infrequently contained running water were not sufficiently linked to navigable waters

in order to be within the jurisdiction of the CWA. *Id.* at 270-71. More recently, the Fifth Circuit put itself squarely in conflict with the Fourth and Sixth Circuits with its decision in *United States v. Needham*, 2003 U.S. App. LEXIS 25318 (5th Cir. 2003). The court made clear that, based on *SWANCC*, a tributary must itself be navigable or truly adjacent to a navigable water to be within the jurisdiction of the CWA. *Id.*

Unfortunately, several circuits, including the Fourth Circuit, failed to interpret *SWANCC* properly. The Fourth Circuit read *SWANCC* to hold that the case applied only to isolated waters, and thus would permit continued CWA jurisdiction over all waters which have at least a minimal hydrological connection to navigable waters. *Newdunn*, 344 F.3d at 417. In accordance with this interpretation, the Fourth Circuit held that wetlands that were connected to a navigable water by multiple drainage ditches, a culvert under a highway, and miles of non-navigable water, were within the jurisdiction of the Corps. *Id.*

The IDA believes that the Fifth Circuit's interpretation of this Court's decision in *SWANCC* is the correct interpretation. The Fourth Circuit's reading of *SWANCC* expands the jurisdiction of the CWA to a point that Congress and this Court had no intention of sending it. The IDA asks this Court to reverse the decision of the Fourth Circuit.

ARGUMENT

I. The United States Army Corps of Engineers has given itself limitless jurisdiction under the Clean Water Act, which Congress did not intend.

Congress passed the Clean Water Act (CWA) for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2002). The CWA was the culmination of a series of legislative measures passed in response to the problem of heavily polluted waters throughout the country, typified by a 1969 fire on the Cuyahoga River in Cleveland caused by a slick of industrial waste. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174-75, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) (Stevens, J., dissenting).

Section 404(a) of the CWA grants the United States Army Corps of Engineers (the "Corps") authority to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (2002). The statute defines the term "navigable waters" as "waters of the United States, including the territorial seas." *Id.* § 1362(7) (2002). However, the statute does not define "waters of the United States." Therefore, the Corps promulgated the following regulations to interpret the meaning of "waters of the United States" under the CWA:

> (a) The term 'waters of the United States' means
>
> > (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign

commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

> (6) The territorial seas;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R. § 328.3(a) (2002).

The IDA does not disagree that any wetlands adjacent to waters that are protected by the CWA are also protected. However, the IDA asserts that wetlands that are not adjacent or contiguous to open waters are not within the jurisdiction of the CWA. The IDA further asserts that manmade drainage or irrigation ditches are not tributaries under the CWA.

The Corps defines "adjacent" to mean "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c).

The Corps' regulations do not define the term "tributary."[3] However, the Corps, in its regulations, explained

3. Though a "tributary" is not defined by the CWA, a "point source" is. A point source is a place by which, in some instances, parties are allowed to discharge pollutants into navigable waters. A "point source" is defined under the CWA as:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel

(Cont'd)

that a manmade ditch is subject to the Corps' jurisdiction only if it extends the ordinary high-water mark of an existing water of the United States. 65 Fed. Reg. 12824-825 (2000). The Corps also states that drainage ditches constructed entirely in upland areas *generally* are not considered to be waters of the United States, *Id.* emphasis added, but the Corps reserves the right on a case-by-case basis to determine whether a particular waterbody [i.e. a ditch] is a water of the United States. 51 Fed. Reg. 41,217 (1986). The Corps provides no meaningful guidelines on the appropriate basis for a case-by-case review. See EPA & Corps, *Guidance for Asserting Federal Jurisdiction Over Isolated Wetlands in Response to U.S. Supreme Court Decision in SWANCC Case* (Jan. 10, 2003) ("Corps 2003 Guidance").

This absence of meaningful guidelines means that the Corps has the power to assert limitless jurisdiction. On a case-by-case basis, the Corps may find a way to assert jurisdiction over any object that carries water, no matter how remote or intermittent, so long as at some point, that water has even a chance of meeting with a traditional navigable water.

(Cont'd)

> or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). This definition is to be broadly interpreted. *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 118 (E.D.N.Y. 2001).

Therefore, by definition, pipes, ditches and conduits are not tributaries, but instead are point sources.

It is unlikely that Congress intended to give the Corps limitless jurisdiction when it passed the CWA. If Congress intended the Corps' jurisdiction to be limitless, it would not have limited the Corps' jurisdiction to "navigable waters" or "waters of the United States." The Corps has exceeded the jurisdiction given to it by Congress in asserting jurisdiction over wetlands that are not adjacent to navigable waters and in identifying manmade drainage and irrigation ditches as tributaries.

II. This Court has limited the Corps' jurisdiction under the Clean Water Act to wetlands that are adjacent to an open body of navigable water.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), this Court interpreted the CWA and the Corps' corresponding regulations, holding that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. Therefore, wetlands which are not themselves navigable bodies of water may nonetheless be regulated under the CWA when they are "inseparably bound up with the 'waters' of the United States." 474 U.S at 134.

However, this Court in *Riverside Bayview* explicitly declined to extend its holding to cases involving wetlands adjacent to non-navigable waters. This Court stated, "[w]e are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . and we do not express any opinion on that question." 474 U.S. at 131 n.8. This is precisely the question the IDA now calls upon this Court to answer.

This Court's most recent decision came in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (SWANCC), 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001), in which this Court limited the scope of the CWA. *SWANCC* involved several isolated ponds that provided a habitat for migratory birds, but were created from pits that were originally part of a sand and gravel mining operation. 531 U.S. at 163. The Corps invoked the Migratory Bird Rule which states that § 404(a) of the CWA extends to intrastate waters "[w]hich are or would be used as habitat by other migratory birds which cross state lines." *Id.* at 164.

This Court held that federal regulation of the waters at issue under the Migratory Bird Rule exceeded the authority granted to the Corps under the CWA. 531 U.S. at 167. In reaching this conclusion, this Court did not overturn *Riverside Bayview*, but instead reasoned that "[i]t was the *significant nexus* between the wetlands and 'navigable waters' that informed [their] reading of the CWA in *Riverside Bayview Homes*." *Id.* Emphasis added.

Further, under *SWANCC*, it appears that a body of water is subject to the jurisdiction of the Corps under the CWA if the body of water is actually navigable or is adjacent to an open body of water. This Court made that point clear when it stated:

> Indeed we did not 'express any opinion' on the 'question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water'. . . . In order to rule for respondents [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open

> water. But we conclude that the text of the statute will not allow this.

531 U.S. at 167-68.

This court then went on to analyze the meaning of "navigable waters" under the CWA. This Court concluded that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172.

The IDA believes that this Court in *SWANCC* has made it clear that inland, non-contiguous wetlands are outside of the jurisdiction of the Corps under the CWA. Only those wetlands that are adjacent to an open body of navigable water are within the jurisdiction of the Corps.

III. The United States Court of Appeals for the Fourth Circuit interpreted *SWANCC* incorrectly and its decision presently before this Court should be reversed.

In the wake of *SWANCC*, courts have struggled with evaluating the jurisdictional reach of § 404(a) of the CWA. Courts interpreting the scope of *SWANCC* have essentially split into two camps. Under one reading, the *SWANCC* case represents a significant shift in the Court's CWA jurisprudence, calling into question the continuing validity of CWA jurisdiction over waters which are not either actually navigable or directly adjacent to navigable waters. On the other hand, an alternative reading of *SWANCC* holds that

> the case applied only to 'isolated waters,' and thus would permit continued CWA jurisdiction over all waters which have at least a minimal hydrological connection to navigable waters.

F D & P Enterprises v. United States Army Corps of Engineers, 239 F. Supp. 2d 509, 513 (D.N.J. 2003).

The United States Court of Appeals for the Fourth Circuit adopted the latter view in its decision that is now before this Court, *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003). The Fourth Circuit held that inland wetlands remotely connected to a navigable water were within the jurisdiction of the Corps under the CWA. 344 F.3d at 417. The wetlands were connected to the navigable water by multiple drainage ditches, a culvert under a highway, and miles of non-navigable waters. *Id.* The court reasoned that a sufficient nexus existed because there was a hydrological connection from the wetlands to the navigable waters. *Id.*

Further, the Fourth Circuit held that a roadside ditch was a tributary. The Fourth Circuit referred to its holding in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). In *Deaton*, the Fourth Circuit held that any branch of a tributary system that eventually flows into a navigable body of water, including a roadside ditch, was within the jurisdiction of the Corps under the CWA. 332 F.3d at 710-11. The Fourth Circuit reasoned that "discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters." *Id.* at 712.

Other circuits have holdings in accordance with the Fourth Circuit's holdings. *See, e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533-34 (9th Cir. 2001) (holding

that irrigation canals that had been polluted with herbicide were "navigable waters" because they receive water from natural streams and lakes and divert water to streams and creeks); *United States v. Eidson*, 108 F.3d 1336, 1341-42 (11th Cir. 1997) (tributaries are "waters of the United States" and manmade ditches and canals that flow intermittently into a creek may be tributaries); *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) (holding that a "hydrologic connection" existed when a wetland was connected through manmade drains and creeks to navigable waters 11 to 20 miles distant, and was therefore, within the CWA's jurisdiction).

Leading the other side of the debate, the Fifth Circuit has interpreted *SWANCC* to substantially limit CWA jurisdiction, holding that under this Court's reasoning, "a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001)[4]. Based on this holding, the Fifth Circuit held that a small seasonal creek and intermittent streams that only infrequently contained running water were not sufficiently linked to navigable waters in order to be subject to CWA jurisdiction. *Id.* at 270-71. The Fifth Circuit reasoned that federal authority does not extend to waters or wetlands "that have only an indirect, remote and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272. *See, e.g., F D & P Enterprises v. U.S. Army Corps of Engineers*, 239 F. Supp. 2d at 516-17 (holding that, under *SWANCC*, a "significant nexus" to a navigable water must constitute more than a mere "hydrological connection").

4. In *Rice*, the Fifth Circuit was interpreting the Oil Pollution Act, 33 U.S.C. § 2701 (the "OPA"). 250 F.3d at 266. The Fifth Circuit noted that the OPA and the CWA contained the same definition of navigable waters, which should be interpreted the same way. *Id.* at 267.

The Fifth Circuit eliminated any argument about its split with the Fourth and Fifth circuit when it announced in *United States v. Needham*, 2003 U.S. App. LEXIS 25318 (5th Cir. 2003), that the Fourth and Fifth Circuit's definition of navigable waters was "unsustainable under *SWANCC*." *Id.* The Fifth Circuit held that "in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.'" *Id.* The court reasoned that the CWA was "not so broad as to permit the federal government to impose regulations over 'tributaries' that [were] neither themselves navigable nor truly adjacent to navigable waters." *Id.*

The district court, in *United States v. Newdunn Associates, LLP*, 195 F. Supp. 2d 751 (E.D. Va. 2002), found the wetlands on Newdunn's property to have only an occasional, manmade, indirect, remote and attenuated connection with a body of navigable water. *Id.* at 758. The Fourth Circuit did not contradict this finding. If Newdunn's property were located in the Fifth Circuit, the district court's opinion would have been affirmed. However, the Fourth Circuit held this indirect, manmade, and occasional nexus to be sufficient. The IDA believes that the Fifth Circuit read this Court's decision in *SWANCC* correctly. The Fourth Circuit's reading of *SWANCC* expands the jurisdiction of the CWA far beyond anything this Court or Congress could have conceived of. For this reason, the IDA asks this Court to reverse the decision of the Fourth Circuit.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

GORDON B. TAYLOE, JR.
Counsel of Record
LEAH M. DAVENPORT
KELLAM, PICKRELL, COX
& TAYLOE, P.C.
300 Bank of Commonwealth
Building
403 Boush Street
Norfolk, VA 23510
(757) 627-8365

Attorneys for Amicus Curiae

(5)

No. 03-637

Supreme Court, U.S.
FILED
DEC 31 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE AMELIA VENTURE PROPERTIES, LLC, J. DENBIGH ASSOCIATES, INC., SMITH FARM ENTERPRISES, LLC, AND SOUTHERN PINES ASSOCIATES, L.C. IN SUPPORT OF PETITIONERS

Hunter W. Sims, Jr.
Counsel of Record
KAUFMAN & CANOLES, PC
150 West Main Street, 21st Floor
Norfolk, Virginia 23510
(757) 624-3000

Counsel for Amici Curiae

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

AMICUS CURIAE BRIEF FOR A WRIT OF CERTIORARI IN SUPPORT OF PETITIONERS 1

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE EPA'S ASSERTION OF JURISDICTION OVER ISOLATED WETLANDS VIOLATES THE CLEAN WATER ACT AND SUPREME COURT PRECEDENT 5

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL 6

III. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE BEWILDERING ARRAY OF GOVERNING CLEAN WATER ACT LAW AND REGULATIONS 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases:

National Mining Ass'n v.
United States Army Corps of Engineers,
145 F.3d 1399 (D.C. Cir. 1998) 1

In re: Needham,
No. 02-30217, 2003 U.S. App. LEXIS 25318
(5th Cir. Dec. 16, 2003) 6, 7

Rice v. Harken Exploration Co.,
250 F.3d 264 (5th Cir. 2001) 6

Solid Waste Agency of Northern Cook County v.
U.S. Army Corps of Engineers,
531 U.S. 159 (2001) 5, 6, 7

Treacy v. Newdunn Associates, LLP,
344 F.3d 407 (4th Cir. 2003) 5

United States v. Deaton,
332 F.3d 698 (4th Cir. 2003) 5, 6

United States v. Riverside Bayview Homes,
474 U.S. 121 (1985) 5

Statutes:

33 U.S.C. § 1362(14) 9

33 U.S.C. § 1362(7) 9

33 U.S.C. § 1362(12) 9

Regulations:

33 C.F.R. § 328.3(a)(5) 9

33 C.F.R. § 328.3(a)(7) 9

33 C.F.R. § 328.4 10

33 C.F.R. § 329.11 10

AMICUS CURIAE BRIEF FOR A WRIT OF CERTIORARI IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Amelia Venture Properties, LLC, J. Denbigh Associates, Inc., Smith Farm Enterprises, LLC, and Southern Pines Associates, L.C. respectfully file this brief as amici curiae in support of Petitioners' Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. Both parties have consented to the filing of this Brief.[1]

Each of the amici curiae are landowners in the Tidewater region of Virginia. Each own an undeveloped tract of land containing wetlands. None of the properties is adjacent to or contiguous to navigable or open water.

Each of the landowners was interested in improving the drainage at their property. After National Mining Ass'n v. United States Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998) overturned the Tulloch rule and permitted ditching activities in wetlands as long as the ditching created only incidental fallback, ditching was permitted. Three of the property owners retained an environmental expert to assist them in performing the ditching work in accordance with all applicable rules and regulations. Appropriate local permits were obtained. The environmental expert and some of the property owners met with the United States Army Corps of Engineers (the "Corps") prior to

---

[1] Counsel for the amicus curiae authored this brief in whole, and no counsel for the parties authored the brief. No person or entity other than the amici curiae have made a monetary contribution to the preparation or submission of the brief.

work being performed. The Corps was fully advised in writing of the scope of work that was to be performed and the techniques that were to be used. The Corps confirmed in writing for the Southern Pines site and Smith Farm sent to the Corps a confirmation letter following a meeting that the work to be performed did not require a § 404 permit. The Corps even inspected one of the properties as work was being performed. At no time during this process did the Corps advise that permits were required pursuant to the Clean Water Act ("CWA") or that the ditching work violated any law, rule, or regulation.

The sites were timbered in areas and specialized equipment was used to dig the ditches so as to minimize environmental impact. Linear ditches were dug not to channel surface water but to drain the ground water. Extreme caution was exercised so that any spillage was incidental fallback not requiring a permit.

Unbeknownst to the landowners, and despite the fact that the Corps had advised Southern Pines and Smith Farm that they did not need a § 404 permit, the local Corps officials sought guidance from headquarters as the work was being performed regarding interpretation of the hopelessly unclear regulations. After the completion of the work, the Environmental Protection Agency ("EPA") swooped in, wrested jurisdiction over the properties from the Corps, and contended that the work had violated Sections 402 and 404 of the CWA. Specifically, the EPA contended that the property owners and operators had violated the law by filling wetlands through the movement of soil and through spreading wood chips that were generated during the timbering and by failing to obtain storm

water pollution prevention permits. The EPA then filed enforcement actions against each of the amici curiae property owners. See In the Matter of Vico Construction Company/Smith Farm Enterprises, LLC/EPA Hearing, Docket No.: CWA-3-2001-0022, In the Matter of Vico Construction Company and Southern Pines Associates, L.C., Docket No.: CWA-03-2003-0325, In the Matter of Vico Construction Company and Amelia Venture Properties, LLC, Docket No. CWA-3-2001-0021, and In the Matter of J. Denbigh Associates, Inc. and Howard B. Hankins, Inc., Docket No.: CWA-3-2003-0375. Two of the cases (Smith Farm and Amelia Ventures) have already been tried and are awaiting the decision of the administrative law judge.

Strikingly, these enforcement actions are not about preventing pollution, the goal of the CWA. In the two enforcement actions already tried, the EPA took no water quality samples and did not contend that any pollutant actually reached navigable waters. In fact, the landowners' water quality expert who did test the water leaving the properties characterized the water turbidity as clearer than some tap water he had tested. The enforcement actions are more about establishing the EPA's right to assert jurisdiction than about protecting the environment.

The property owners steadfastly deny that they filled any wetlands and also, as is more pertinent to this case, deny that the wetlands on their properties are jurisdictional wetlands, i.e. "water of the United States;" subject to the CWA. The EPA makes its claim of jurisdiction over the properties based upon the asserted eventual hydrologic connection between the Tulloch ditches and navigable water.

Each of the amici curiae are currently opposing the EPA's sweeping assertion of jurisdiction over the wetlands on their properties because the wetlands are isolated and do not have a sufficient nexus to navigable water. The Tulloch ditches feed into other pre-existing ditches that exit the properties. This water then travels through culverts or other man-made crossings under highways and railroads before reaching any navigable water. In every case, the drainage ways forming the asserted hydrologic connection are intermittent, running dry without any flow during parts of the year.

Accordingly, the amici curiae's properties are like the Petitioners' in that they contain only isolated wetlands. Certiorari should be granted so that the EPA's assertion of jurisdiction over these properties can be rejected.

SUMMARY OF ARGUMENT

This case appeals the Corps' assertion of jurisdiction over isolated wetlands. Like the Petitioners, amici curiae are landowners embroiled in litigation with the EPA to oppose the EPA's expansive interpretations of its own jurisdiction.

The Corps and EPA claim jurisdiction over wetlands when the wetlands are hydrologically connected to navigable water without establishing any "significant nexus" between the properties' water and navigable water and interstate commerce. Because such a sweeping claim of jurisdiction violates this Court's guidance, it should be rejected.

This case presents an early opportunity for the Court to resolve conflicting circuit court interpretations of CWA jurisdiction and to provide much needed

certainty to landowners and government regulators, both of whom are floundering in the absence of any clear articulation of the scope of CWA jurisdiction.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE EPA'S ASSERTION OF JURISDICTION OVER ISOLATED WETLANDS VIOLATES THE CLEAN WATER ACT AND SUPREME COURT PRECEDENT.

The EPA's assertions of jurisdiction over the Petitioners' and amici curiae's properties conflict with the CWA and with this Court's decisions in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC") and United States v. Riverside Bayview Homes, 474 U.S. 121 (1985). The Fourth Circuit's most recent pronouncements in United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), and Treacy v. Newdunn Associates, LLP, 344 F.3d 407 (4th Cir. 2003), similarly conflict.

SWANCC held that the text of the CWA did not permit jurisdiction to be asserted over ponds that were "*not* adjacent to open water." 531 U.S. at 168 (emphasis in original). The dissent therefore characterized SWANCC as "excising" from CWA jurisdiction intermittent streams and wetlands that are not contiguous or adjacent to navigable waters. Id. at 189-90 n.14 (Stevens, J., dissenting). Instead, a "significant nexus" with navigable water is required.

Because the wetlands on both the Petitioners' and amici curiae's properties are not adjacent to navigable waters or primary tributaries, because all waterbodies leaving the properties are intermittent,

and because the EPA cannot establish a significant nexus between the properties and navigable water and commerce, jurisdiction over the wetlands is inappropriate under this Court's precedents.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL.

This month, the Court of Appeals for the Fifth Circuit issued its opinion in In re: Needham, No. 02-30217, 2003 U.S. App. LEXIS 25318 (5th Cir. Dec. 16, 2003), building on its earlier decision Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001).

The Needham ruling expressly distinguishes itself from prior Court of Appeals for the Fourth Circuit precedent, id. at 7, and holds that the "United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under SWANCC, 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.'" Id. at 8.

The Fifth Circuit's Needham holding is squarely in conflict with the Fourth Circuit's holdings both in this case and in the recently decided United States v. Deaton, 332 F.3d 698 (4th Cir. 2003). Both Fourth Circuit cases accept the "hydrologic connection" theory in permitting the Corps and EPA to assert jurisdiction over any wetlands adjacent to any waterbody from which a path can be traced eventually to navigable waters irrespective of the rate or frequency of flow or the distance to navigable waters. In Deaton, the Fourth Circuit deferred to the Corps' claim of jurisdiction over "any branch of a tributary system that **eventually flows** into a navigable body of water." Id. at 711

(emphasis added). The hydrologic connection theory was explicitly rejected in Needham. Needham, slip opn. at 11 ("the term adjacent cannot include every possible source of water that eventually flows into a navigable-in-fact waterway"). Basing jurisdiction on hydrologic connections creates boundless jurisdiction because it could be claimed that any waterbody on the eastern half of the United States **eventually** flows into the Atlantic Ocean. The hydrologic connection theory requires no showing of a significant nexus between the waterbody and navigable water or commerce as has been required by this Court in SWANCC.

Because of this circuit split, a landowner in the Fourth Circuit will be subject to CWA jurisdiction when an identically situated landowner in the Fifth Circuit will not. This discrepancy is of particular concern to the Tidewater, Virginia region given the prevalence of wetlands in the area and to the amici curiae given the personal cost to them of the EPA's assertions of jurisdiction over their properties.

III. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE BEWILDERING ARRAY OF GOVERNING CLEAN WATER ACT LAW AND REGULATIONS.

Each of the amici curiae are landowners whose property rights have been diminished by the Corps' and EPA's sweeping assertions of jurisdiction over their properties. Each landowner was surprised completely by the EPA's eventual contention that the work done on their property required CWA permits because the law and regulations on jurisdiction are so unclear.

The interplay between the CWA, the Corps' regulations, and this Court's opinions is so confusing that even the Corps and EPA are befuddled when applying them to particular situations. In the cases involving the amici curiae despite having pre-authorized the procedures used and viewed the work in progress, the Corps never advised that a permit was required or requested that the work stop. Instead, the Corps sat on its hands and sought guidance about the work because its own regulations are unclear. In addition, and perhaps more damning, the Corps never advised the amici curiae that it was seeking guidance from its headquarters after the Corps had told the amici curiae that § 404 permits were not necessary for the work the amici curiae intended to perform. If the Corps simply had advised that the work was problematic or that it required permits, or that the Corps had questions and was seeking further guidance, the landowners would have complied gladly with all rules and regulations. That is why they retained an environmental expert and actively solicited Corps' involvement. Instead, the Corps said nothing and the work progressed to completion. Enforcement actions were then filed by the EPA after the work was completed.

Apparently recognizing that its regulations were incomprehensible, the Corps planned to develop new regulations. A political retreat was sounded, however, with a recent December 17th announcement that no new rule-making would be pursued, leaving the judiciary as the only hope for clarity.

The uncertainty generated by the current incomprehensible regulations encourages lengthy litigation. Although the work at issue in these cases

was completed years ago, the enforcement actions still drag on, with two of the four actions in their infancy. Litigation over jurisdictional debates is expert-intensive and costly. Because of the prevalence of wetlands throughout the Tidewater Virginia region, many landowners' property interests will be curtailed if CWA jurisdiction continues to be broadly interpreted. Nonetheless, only a few of these landowners will have the wherewithal to challenge the government's assertions of jurisdiction.

Perhaps knowing this limitation, the EPA and Corps continue to claim expansive jurisdiction, even when their interpretations conflict with the CWA or their own regulations.

For example, the CWA prohibits the discharge of a pollutant to "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1362(7) and (12). Corps regulations define "waters of the United States" as including "tributaries" and "wetlands" that are adjacent to tributaries. 33 C.F.R. §§ 328.3(a)(5) and (7). Therefore, the more waterbodies can be characterized as "tributaries," the more CWA jurisdiction expands. Although "tributary" was formerly defined in regulations, it is not a defined term presently. Accordingly, the Corps and EPA make up the definition as they go along.

In the enforcement actions against the amici curiae, the EPA characterizes just about any waterbody as a "tributary." Because these trickles of water do not bear any name on standardized maps, the enforcement action trials are replete with references to "unnamed tributaries." Despite the CWA's defining ditches as an example of a "point source," 33 U.S.C. § 1362(14),

roadside ditches become "tributaries" under the EPA's interpretations. Places where a wetland begins to form into a stream were called tributaries in the enforcement actions. The Corps representative testified about one such "tributary": "this is the start of the tributary. It isn't actually waters or a stream or anything of that at this point. It is a wetland area . . .. The actual exhibit shows an area of blackened leaves in that center portion of the photo. This is where the tributary actually starts."). Transcript of Amelia Venture Properties, LLC enforcement action at 345. Apparently, the EPA contends that wet areas are "tributaries" even when the waterbody lacks any discernible flow. Such an interpretation conflicts both with the CWA and with common sense.

Likewise, because the regulations provide that jurisdiction extends to the "ordinary high water mark," 33 C.F.R. § 328.4, the EPA has contended in the enforcement actions that marks evidencing the mere passage of water constitute "ordinary high water marks." This interpretation again ignores the plain text of the regulatory definition, which requires a line on a "shore," a term undefined in the regulations. Because the term is not defined, the Corps and EPA view the term "shore" as synonymous with "bank" even though the two terms are used distinctly in the same regulation. See 33 C.F.R. § 329.11.

In the enforcement actions already tried, counsel for the EPA repeatedly asked experts whether they were using terms such as "navigable" in a "descriptive sense" or in a "regulatory sense" because, according to the EPA, terms frequently have a different meaning under the regulations than the commonly understood definition. That straightforward terms used in

regulations have developed meanings completely divorced from their dictionary definitions is a sure sign that regulatory rulemaking has run amuck.

The EPA and Corps string these suspect definitions together to assert jurisdiction over isolated wetlands. Even though the assertion of jurisdiction over such lands is not permitted under the text of the CWA, the EPA relies on a series of interlocking regulations and its wishful spin on these regulations to claim jurisdiction. Tellingly, when asked during the trial of one of the enforcement actions how a property owner would be able to determine without expert assistance whether the property would be subject to CWA jurisdiction, the Corps' representative truthfully admitted that such a task would be impossible.

While amici curiae certainly urge the Court to reign in the Corps' and EPA's current expansive claims of jurisdiction pursuant to the CWA, amici curiae respectfully request that the Court grant certiorari simply to generate a clear rule outlining the bounds of jurisdiction so that other landowners will not endure the expense and hardship caused by the present system of ad hoc jurisdictional determinations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

HUNTER W. SIMS, JR.
Kaufman & Canoles, PC
150 W. Main Street, 21st Floor
Norfolk, VA 23510
(757)624-3000

(8) (13) (-2)

Nos. 03-637, 03-701 & 03-929

Supreme Court, U.S.
FILED
JAN 30 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP, et al., *Petitioners,*

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *Respondent.*

JAMES S. and REBECCA DEATON, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

JOHN A. RAPANOS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Fourth And Sixth Circuits

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, FLORIDA STORMWATER ASSOCIATION, FLORIDA ASSOCIATION OF SPECIAL DISTRICTS, SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND CITY OF CLEWISTON IN SUPPORT OF THE PETITION FOR WRITS OF CERTIORARI

ROBERT J. SANER
General Counsel for *Amicus*
National Association of
Flood and Stormwater
Management Agencies
POWERS, PYLES, SUTTER &
VERVILLE, P.C.
1875 Eye Street N.W.
Washington, D.C. 20006
(202) 466-6550

JAMES E. NUTT
Counsel of Record
SHERYL GRIMM WOOD
SCOTT ALLEN GLAZIER
SOUTH FLORIDA WATER
MANAGEMENT DISTRICT
3301 Gun Club Road
West Palm Beach, FL 33406
(561) 682-6253
Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

C. ALLEN WATTS
Florida Stormwater Association
COBB AND COLE
150 Magnolia Avenue
Daytona Beach, FL 32114
(386) 255-8171

TERRY E. LEWIS
Florida Association of Special Districts
LEWIS, LONGMAN & WALKER, P.A.
1700 Palm Beach Lakes Blvd.
Suite 1000
West Palm Beach, FL 33401
(561) 640-0820

JOHN A. YAUN
City of Clewiston
115 West Ventura Avenue
Clewiston, FL 33440
(863) 983-8175

QUESTION PRESENTED

The courts of appeals are deeply divided over the meaning of "navigable waters" and the principles enunciated in *Solid Waste Agency of Northern Cook County* v. *United States Corps of Engineers*, 53 U.S. 159 (2001). What constitutes a "navigable water" determines the scope of federal regulatory jurisdiction and, thus, delineates federal and state roles in protection of the nation's waters under the Clean Water Act, the Oil Pollution Act and other significant federal legislation. *Amici curiae* – various state agencies, local governments and others involved in water resource management – believe it is of critical national importance for the Court to clarify which principles properly define what is and is not a "navigable water" through the following question presented:

Whether federal jurisdiction over "navigable waters" extends to all waters that have any hydrologic connection with a navigable-in-fact water body, regardless of proximity and no matter how indirect, intermittent or ephemeral their connections may be?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
ARGUMENT	4
I. The Courts Of Appeals Are Deeply Divided Over The Reach Of "Navigable Waters" And Scope Of Federal Regulations Based Thereon	4
II. It Is Of Critical National Importance To State And Local Water Managers For This Court To Resolve The Conflict Below And Clarify The Meaning Of "Navigable Waters"	6
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

In re: Needham, ___ F.3d ___, 57 ERC 1673 (5th Cir. 2003) 6

Newdunn v. *United States Corps of Engineers*, 344 F.3d 407 (4th Cir. 2003) 5, 7

Rice v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) 6

Solid Waste Agency of Northern Cook County v. *United States Corps of Engineers*, 531 U.S. 159 (2001) 3, 4, 5, 6

United States v. *Deaton*, 332 F.3d 698 (4th Cir. 2003) 5, 7

United States v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003) 5, 7, 8

STATUTES

Clean Water Act §101(b), 33 U.S.C. §1251(b) 3

Clean Water Act §101(g), 33 U.S.C. §1251(g) 3

Clean Water Act §402, 33 U.S.C. §1342 3

Clean Water Act §402(p), 33 U.S.C. §1342(p) 3

Clean Water Act §404, 33 U.S.C. §1344 3

Fla. Stat. §373.016 2

Fla. Stat. §373.069 2

Fla. Stat. §373.069(2)(e) 2

Fla. Stat. §373.073 2

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

THE CLEAN WATER HANDBOOK (M. Ryan ed. 2003)..... 3

EPA, APPELLATE DECISIONS MAY RETURN WATER ACT BATTLE TO HIGH COURT, INSIDE EPA Vol. 24, No. 51 (Dec. 19, 2003)..... 6

INTEREST OF THE *AMICI CURIAE*

Amici curiae[1] – National Association of Flood and Stormwater Management Agencies, Florida Association of Special Districts, Florida Stormwater Association, South Florida Water Management District, and City of Clewiston – submit this brief to encourage granting the Petitions for Writs of Certiorari in *United States* v. *Deaton*, Case No. 03-701; *Newdunn* v. *United States Army Corps of Engineeers*, Case No. 03-637; and *Rapanos* v. *United States*, Case No. 03-929.

Amici include state agencies, local governments and a consortia of cities and local water management groups all with a strong interest in the clear and consistent interpretation of "navigable waters" – the term of art used to establish the geographic scope of federal jurisdiction under several significant federal regulatory programs, including the Clean Water Act and the Oil Protection Act. *Amici* are concerned with the reasonable and uniform application of those programs, which create distinct regulatory roles for the federal, state and local governments in the preservation and protection of all waters.

NAFSMA, established in 1979, represents more than 100 local and state flood control and stormwater management agencies. Its members are public agencies that protect lives, property and economic activity from storm and flood waters. NAFSMA is also focused upon the improvement of the health and quality of our nation's

---

[1] This brief is being filed concurrently with the written consents of all parties. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

waters. Its mission is to advocate public policy, encourage technologies and conduct education programs to facilitate and enhance its member's public service.

Florida Association of Special Districts is an association representing 89 special districts in the State of Florida, including 39 of the State's drainage districts. A large portion of the activities of drainage districts is the construction, operation and management of structures which control the movement of waters within their jurisdictions.

The Florida Stormwater Association (FSA) is a non-profit organization with almost 200 member cities and counties, water management districts, engineering firms, and others interested in surface water quality. FSA is an active participant in the development of stormwater management policy and works to create solutions to stormwater management problems that can be implemented by local governments. It provides training and education, information sharing and advocacy relating to water issues.

The South Florida Water Management District (SFWMD) is one of five water management districts with stewardship over Florida's public water resources. §§ 373.069 & 373.016, Fla. Stat. The District establishes and implements the State's water policies from Orlando to Key West. §§ 373.069(2)(e), 373.073 & 373.016, Fla. Stat. It operates a comprehensive water management system of levees, canals and flow diversion facilities designed to control and allocate the waters throughout the watersheds within its jurisdiction for flood control, water supply, and environmental purposes.

The City of Clewiston is a municipal corporation located in South Florida that has approximately 6,500 residents.

The *Amici,* their members and similar agencies nationwide are responsible for innumerable public works which today manage surface waters to provide flood control, water supply and protection for the natural systems. These public works are ofter subject to a variety of federal programs, including construction permits under the Corps § 404 dredge and fill program; Municipal Separate Storm Sewer Systems under § 402(p); and other National Pollutant Discharge Elimination System permits under § 402. Whether these federal regulatory programs apply to any given activity or facility depends, in large part, upon whether the waters involved are characterized as "navigable" or not. Congress left the remainder of the task of preventing water pollution to the States, with federal guidance, assistance, and oversight. See THE CLEAN WATER HANDBOOK 191-220 (M. Ryan ed. 2003).

Congress took seriously this division of responsibility between the federal government and the States, reflecting its intent to maintain States' traditional powers over water allocation and water and land use. See 33 U.S.C. § 1251(b) & (g). As this Court recently observed, the Clean Water Act must be interpreted with Congress's intent to maintain the federal-state balance of powers firmly in mind. *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159, 166-167, 173 (2001) (*SWANCC*).

Amici are also concerned that expanding federal CWA requirements to many areas far outside traditional navigable waters would mandate costly, time-consuming, and

burdensome bureaucratic proceedings, exposing water agencies to huge penalties for past violations, and interfering with the States' own highly developed pollution programs – consequences never intended by Congress.

For these and other reasons explained below, *Amici* urge the Court to clarify the principles enunciated in *SWANCC* and the proper scope of "navigable waters" while maintaining the proper federal and state balance in our partnership to restore and protect all of the nation's waters.

ARGUMENT

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER THE REACH OF "NAVIGABLE WATERS" AND SCOPE OF FEDERAL REGULATIONS BASED THEREON.

The term "navigable waters" has been used by Congress for well over a century to define the reach of federal jurisdiction under several critical regulatory programs. Today it appears 215 times in the United States Code and 735 more times in the Code of Federal Regulations. Nonetheless, a definitive reliable test to determine what constitutes "navigable waters" remains strikingly elusive. The principles laid down by this Court in *SWANCC* to guide such determinations have instead become the subject of deep conflict among courts of appeals.

In *SWANCC*, the Court interpreted "navigable waters" to include waters with a "significant nexus" to a navigable-in-fact water body. 531 U.S. 159 (2001). Rejecting the United State's position, the Court explained that "In order to rule for [the government] . . . we would have to hold that

the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water." Ibid. at 168 (emphasis original). Importantly for *Amici*, the Court recognized that "permitting [the Corps] to claim federal jurisdiction over ponds and mudflats would result in a significant impingement of the States' traditional and primary power over land and water use." Ibid. at 174.

Since *SWANCC*, the courts continue to differ over what constitutes a "nexus" significant enough to transfer jurisdiction over water use from state to federal regulators. Some courts apply a narrow test that requires waters to be "adjacent" to open waters to be considered navigable, while others accept *any* hydrologic connection as sufficient.

In the instant cases, the Fourth and Sixth Circuits found a "significant nexus" in slight, indirect, intermittent and arguably hypothetical hydrologic connections. For example, in *Deaton* the Fourth Circuit found federal jurisdiction over a roadside ditch located eight miles from a navigable-in-fact water. Similarly, the Fourth Circuit in *Newdunn* upheld the exercise of federal jurisdiction over waters found to be "remote" from navigable waters to which they were connected only by intermittent surface waters. In *Rapanos*, the Sixth Circuit again found jurisdiction over wetlands that were admittedly not themselves adjacent to navigable waters. Thus, these cases involve lands located significant distances from any traditionally navigable waters and with the most tenuous of hydrologic connections to them.

The Fifth Circuit has squarely rejected the Fourth and Sixth Circuit's proposition in these cases that any hydrologic connection creates a "significant nexus" to

navigable waters. In *Rice* v. *Harken Exploration Co.*, the court of appeals interpreted *SWANCC* to mean that "a body of water is [navigable] only if it is actually navigable or is adjacent to an open body of navigable water." 250 F.3d 264, 270 (5th Cir. 2001). More recently and pointedly, in *In re: Needham*, ___ F.3d ___, 57 ERC 1673 (5th Cir. 2003), the Fifth Circuit flatly stated that the Fourth and Sixth Circuit's view is "unsustainable under *SWANCC*," solidifying its position that a "significant nexus" requires not merely a remote hydrologic connection, but also some reasonable proximity. This conflict, expressly noted in *Needham*, is clear, deep and irreconcilable.

II. IT IS OF CRITICAL NATIONAL IMPORTANCE TO STATE AND LOCAL WATER MANAGERS FOR THIS COURT TO RESOLVE THE CONFLICT BELOW AND CLARIFY THE MEANING OF "NAVIGABLE WATERS."

The inter-circuit conflict over the question presented should be immediately resolved by this Court for several reasons.

1. The Court cannot expect the federal agencies to provide sufficient guidance to overcome this split among the courts of appeals. To the contrary, EPA and the Corps recently abandoned previously announced plans to address CWA jurisdiction and the principles enunciated in *SWANCC* through rulemaking, plainly leaving this conflict to be resolved by the Court. EPA, APPELLATE DECISIONS MAY RETURN WATER ACT BATTLE TO HIGH COURT, INSIDE EPA Vol. 24, No. 51 (Dec. 19, 2003). Continued percolation of this issue will simply add to the confusion and burdens described below.

2. Whatever the result, the *Amici* deserve clarity and uniformity in how the federal laws are applied. Water managers and local governments should not be subjected to different federal permitting depending upon which judicial circuit they operate. As it stands, the rights of *amici* improperly vary from circuit to circuit and remain increasingly uncertain in those circuits that have not decisively addressed the question presented here.

3. The almost limitless interpretation of "navigable waters" adopted in *Deaton*, *Newdunn* and *Rapanos* most certainly shifts the federal-state balance struck in the Clean Water Act. Virtually all water management and drainage districts, counties and cities traditionally use canals, ditches, culverts, gutters and other drainage works to manage surface waters. Where these are all considered "navigable waters" simply because waters from them *may* "eventually flow" to a water body that is actually navigable-in-fact, any distinction intended by the term "navigable" is lost.

As the scope of "navigable waters" expands, several Clean Water Act permitting programs become even more extensively applied to traditionally local water management activities. As the Deatons correctly point out, the present conflict obscures and confuses what is national and what is local. *Deaton* Br. 22. Congress should not lightly be assumed to have intended such a result. In fact, the Act should not be read so broadly absent a clear statement that Congress intended to so transform the balance of federal and state rights and responsibilities.

4. On a practical level, significant regulatory burdens, costs and delays will be added to important public works with the expansion of federal permitting. Where there is

no evidence of the waters actually reaching or harming any navigable water, these burdens are added for no identifiable environmental benefit. Moreover, programs such as the National Pollutant Discharge Elimination System lack the flexibility necessary to accommodate local concerns and will supplant local decision making and programs designed to allow systemic planning. State and local government resources remain increasingly hard pressed to handle growing urban, agricultural and natural systems needs. Additional burdens should neither be ignored nor so easily extended.

5. Finally, confusion among the courts of appeals creates heightened problems where as here, the federal regulatory scheme brings with it not only fines but the potential for criminal penalties including jail. See *Rapanos*. Given the conflicts amongst the courts of appeals, *Amici* increasingly risk unanticipated and unpredictable liabilities.

CONCLUSION

There are few issues more critical to state and local water managers, including counties, municipalities, flood control and drainage districts, and stormwater utilities than the need to clearly understand the scope and reach of the many federal regulatory programs under which they operate. The conflict among the Circuits has created confusion and uncertainty and should now be resolved by this Court.

The *Amici* therefore urge this Court to accept the petitions and resolve the question presented.

Respectfully submitted,

JAMES E. NUTT
Counsel of Record
SOUTH FLORIDA WATER
MANAGEMENT DISTRICT
3301 Gun Club Road
West Palm Beach, FL 33406
(561) 682-6253

January 2004